CASES
ON
THE LAW OF DOMESTIC RELATIONS

LONG

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

ILLUSTRATIVE CASES

ON

THE LAW OF

DOMESTIC RELATIONS

SELECTED BY
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Arranged to Accompany the Author's
Text on the Same Subject.

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PREFACE.

This collection of cases on the Law of Domestic Relations does not by any means purport to embody a complete exposition of the subject. The cases are intended to be merely illustrative of a text-book setting forth the subject fully. The cases have been selected with special reference to the importance and need of illustration of the several points covered. Obsolete, simple, or relatively unimportant matters have been omitted. Care has been taken to include only cases of real value for teaching purposes, and it is contemplated that there should be no selection from among the cases but that the student should read them all. In most instances the opinion of the court has been printed in full. Wherever omissions occur this fact is indicated. The preliminary statements have been prepared by the compiler. This collection was prepared more particularly for use with the compiler's own text-book on the subject, and references are given with each case to the appropriate sections of that work. It is believed, however, that these cases will be found equally useful with any other text-book on the subject.

Lexington, Virginia, July, 1915. J. R. L.

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I. HUSBAND AND WIFE.

MARRIAGE.

1. What Constitutes Marriage.

PECK v. PECK.

155 Mass. 479, 30 N. E. 74. (1892.)

Suit for divorce by William F. Peck against Sarah G. Peck. Bill dismissed on the ground that there was no valid marriage. Affirmed.

LATHROP, J.: This is a libel for divorce on the ground of desertion, filed February 2, 1891. The justice of the superior court who heard the case found that no valid marriage was proved, and ordered the libel to be dismissed. The case comes before us on a report of the evidence, from which it appears that on October 5, 1877, the parties, having for three years before had their domicile in the state of California, executed the following contract at Portland, Ore., which was witnessed by two persons: "We, the undersigned, hereby enter into a copartnership on the basis of the true marriage relation. Recognizing love as the only law which should govern the sexual relationship, we agree to continue this copartnership so long as mutual affection shall exist, and to dissolve it when the union becomes disagreeable or undesirable to either party. We also agree that all property that shall be acquired by mutual effort shall be equally divided on the dissolution of said copartnership. Should any children result from this union, we pledge ourselves to be mutually held and bound to provide them support, whether the union continues or is dissolved."

It is further found that the parties thereafterwards lived together under said contract, and held themselves out to be husband and wife, in the state of Oregon, for about three months; in California for about one year; in Iowa, for about three and a half years; in New York, for about three months, and at Boston, in this commonwealth, from 1886 to the time of the alleged desertion, on or about January 15, 1888, and that both said par-

ties have resided in this state from said alleged desertion to the day of the filing of the libel; that the libelee was a spiritualist public speaker, who, on account of peculiar religious and business motives, and by consent of the libelant, retained the name of Mrs. H. S. Lake, the name of her former husband, who died before the year 1877, and there never was any ceremony, act, or solemnization of marriage between them, save as herein stated. The report also sets out the laws relating to marriage of the states of California, Oregon, Iowa and New York, but does not refer us to any decisions of the courts of those states construing the laws set forth.

There is nothing in the law of California, where the parties had their domicile, or in the law of Oregon, where the contract was signed, which recognizes an agreement to live together, "so long as mutual affection shall exist," as a marriage contract. We have, therefore, no occasion to consider whether, by the law of either of those states, there can be a marriage by a mere contract, without a ceremony. There being no marriage, their subsequent cohabitation points only to the illegal contract under which it began. There is no room for any presumptions. We find nothing in the laws of the states where they lived together which recognizes such a cohabitation as a marriage. Randlett v. Rice, 141 Mass. 385, 394, 6 N. E. 238; Norcross v. Norcross, 155 Mass. 425, 29 N. E. 506. Decree affirmed.

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2. CAPACITY OF PARTIES.

a. *Consanguinity.*

Sutton v. Warren, 10 Metc. (Mass.) 451, post, p. 65.
United States v. Rodgers, 109 Fed. 886, post, p. 73.
Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, post, p. 83.

b. *Physical Capacity.*

GOULD v. GOULD.

78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531. (1905.)

Action by Marion D. Gould against Roy S. Gould for a divorce or a decree of nullity on the ground that the defendant had fraudulently concealed from her at the time of their marriage that he was an epileptic. The action was brought under a Connecticut statute. The action was dismissed on default of defendant. Judgment reversed and a new trial ordered.

BALDWIN, J.: In 1895 a statute was enacted of which the first section reads as follows: "No man or woman, either of whom is epileptic, imbecile, or feeble-minded, shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age. Any person violating or attempting to violate any of the provisions of this section shall be imprisoned in the state prison not less than three years." Pub. Acts 1895, p. 667, ch. 325. Cf. Gen. St. 1902, § 1354. In 1899 the plaintiff, at the age of 22, married the defendant, who was an epileptic. In 1903 a child was born, issue of the marriage, and soon afterwards the plaintiff, then first learning of the statute mentioned, left the defendant, and brought this suit for a divorce or a decree that the marriage was null and void. In her complaint she alleged that the defendant, though an epileptic, falsely and fraudulently concealed this fact from her, and represented that he had never had epilepsy; in consequence of which representations she, believing them to be true, had been induced to enter into the contract of marriage. On the trial in this court, no argument was submitted in behalf of the defendant. The proper disposition of a cause of this character is, however, a matter of public concern, in the interest of society, and we feel bound to examine such considerations in support of the judgment appealed from as he might have urged, had he been represented by counsel. Allen v. Allen, 73 Conn. 54, 55, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. Rep. 135.

Was the statute a valid act of legislation? It forbade the marriage of certain classes of persons under any circumstances. One of these, only, it is now necessary to consider—that of epileptics. The provisions of the act of 1895 were separable with respect to the different classes of persons with whom it deals, and, so far as this action is concerned, it is enough if it can be supported as to marriages contracted after its enactment by those in the condition of the defendant. Pub. Acts 1895, p. 667, ch. 325. The Constitution of this state (preamble and article 1, § 1) guarantees to its people equality under the law in the rights to "life, liberty, and the pursuits of happiness." State v. Conlon, 65 Conn. 478, 489-491, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227. One of these is the right to contract marriage, but it is a right that can only be exercised under such reasonable conditions as the legislature may see fit to impose. It is not possessed by those below a certain age. It is denied to those who stand within certain degrees of kinship. The mode of celebrating it is prescribed in strict and exclusive terms. Gen. Stat. 1902, § 4538.

The universal prohibition in all civilized countries of marriages between near kindred proceeds in part from the established fact that the issue of such marriages are often, though by no means always, of an inferior type of physical or mental development. That epilepsy is a disease of a peculiarly serious and revolting character, tending to weaken mental force, and often descending from parent to child, or entailing upon the offspring of the sufferer some other grave form of nervous malady, is a matter of common knowledge, of which courts will take judicial notice. State v. Main, 69 Conn. 123, 135, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30. One mode of guarding against the perpetuation of epilepsy obviously is to forbid sexual intercourse with those afflicted by it, and to preclude such opportunities for sexual intercourse as marriage furnishes. To impose such a restriction upon the right to contract marriage, if not intrinsically unreasonable, is no invasion of the equality of all men before the law, if it applies equally to all, under the same circumstances, who belong to a certain class of persons, which class can reasonably be regarded as one requiring special legislation either for their protection or for the protection from them of the community at large. It can not be pronounced by the judiciary to be intrinsically unreasonable if it should be regarded as a determination by the general assembly that a law of this kind is necessary for the preservation of public health, and if there are substantial grounds for believing that such determination is supported by the facts upon which it is apparent that it was based. Holden v. Hardy, 169 U. S. 366, 398, 18 Sup. Ct. 383, 42 L. ed. 780; Bissell v. Davidson, 65 Conn. 183, 192, 32 Atl. 348, 29 L. R. A. 251. There can be no doubt as to the opinion of the general assembly, nor as to its resting on substantial foundations. The class of persons to whom the statute applies is not one arbitrarily formed to suit its purpose. It is certain and definite. It is a class capable of endangering the health of families and adding greatly to the sum of human suffering. Between the members of this class there is no discrimination, and the prohibitions of the statute cease to operate when, by the attainment of a certain age by one of those whom it affects, the occasion for the restriction is deemed to become less imperative. While Connecticut was a pioneer in this country with respect to legislation of this character, it no longer stands alone. Michigan, Minnesota, Kansas and Ohio have, since 1895, acted in the same direction. 2 Howard on Matrimonial Institutions, 400, 479, 480; Sess. Laws Ohio, 1904, p. 83. Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable

by proper precautions, and that it is not unjust in certain cases to require the observation of these, even at the cost of narrowing what in former days was regarded as the proper domain of individual right. It follows that the statute in question was not invalid, as respects marriages contracted by epileptics, after it took effect.

The next question which present itself is whether the marriage of the plaintiff was void. A contract for any matter or thing against the prohibition of a statute is treated as void, although the statute does not declare it to be so, if such contract be relied on in any action as the foundation of the right of recovery. Preston v. Bacon, 4 Conn. 471, 480; Finn v. Donahue, 35 Conn. 216. But a contract of marriage is sui generis. It is simply introductory to the creation of a status, and what that status is the law determines. A contract executed in contravention of law may yet establish a status which the law will recognize, and, if one of the contracting parties were innocent of any intention to violate the law, may recognize as carrying with it in his favor the same rights and duties as if the contract had been entirely unexceptionable. In re Grimley, 137 U. S. 147, 152, 153, 11 Sup. Ct. 54, 34 L. ed. 636.

The common law of England followed the canon law in regarding a marriage once lawfully entered into as dissoluble only by an extraordinary act of the sovereign power. It followed the canon law also in holding marriages entered into by those under canonical disabilities to be voidable by the spiritual courts, and held them to be voidable only. They were therefore esteemed valid for all civil purposes, unless a sentence of nullity were pronounced during the life of both parties. Glanville, book 3, ch. 17; Kenn's Case, 7 Rep. 42. On the other hand, there were certain fundamental disabilities, depending not on the canon law, but on universal or municipal law, which might render a marriage void ab initio; such as a prior marriage of either party, a want of age sufficient to give capacity to consent, and a want at any age of the necessary mental capacity. 1 Blackstone's Comm. 434-439.

In the revision of 1702 the general assembly of this state prohibited marriages between those within certain degrees of kinship, and also the celebration of marriages without the publication of banns, and, in case of minors, without the consent of the parent or guardian, or before one not having due authority. In case of a violation of the prohibition first mentioned the marriage was expressly declared to be null and void. For a violation of the others a pecuniary forfeiture was prescribed.

Rev. 1702, p. 74. In 1717 bigamous marriages were declared to be null and void, and those between parties under the age of consent. Questions soon arose as to whether the marriages celebrated in contravention of the prohibition of the statute of 1702 could be treated as valid. That they could be if the only objection was the want of the consent of parent or guardian, or a failure to publish the banns, was generally conceded; but it was seriously questioned if one could be upheld which was celebrated before a person not duly authorized. To settle this point a provision was introduced into the revision of 1821, following in part Lord Hardwick's act of 1753, expressly declaring such a marriage to be void. Rev. 1821, pp. 316, 318, note; Gen. St. 1902, § 4538. The act of 1895 did not (and Gen. St. 1902, § 1354, does not) make such a declaration with reference to the marriage of an epileptic. It contented itself with imposing criminal penalties. It inferentially sanctioned, in case of such a marriage, the living together of the parties "as husband and wife" after the latter arrived at the age of 45. The omission to declare the marriage to be void is made doubly significant by the fact that such a declaration is found embodied in two of the other statutory prohibitions (Gen. St. 1902, §§ 4534, 4538), and not in a third (§ 4535). It may well be that the general assembly were no more inclined to bastardize the issue of the marriage of an epileptic than that of a minor married without parental consent. We therefore conclude that the legislature intended to leave the effect of a marriage contracted in violation of the act of 1895 to be determined by the general principles of the common law. These lead to the conclusion that it is dissoluble, rather than void.

The common law, however, held that, when a marriage was avoided on account of canonical disabilities, it must be by a decree of nulity which pronounced it void ab initio. This doctrine rested on the theory of the Roman Catholic Church that, if a marriage were once contracted under its sanction, it acquired a sacramental character, and was indissoluble by human authority. A spiritual court could adjudge that two parties, though apparently married, never really were. No court could dissolve what was in fact a marriage for any cause. No such theory was ever recognized in the laws of Connecticut. Divorces have been freely granted from the first, and since 1667 one of the causes has been "fraudulent contract." This was judicially defined more than a century ago as a fraud entering into the substance of the marriage relation, preceding it, "and such a one as rendered the marriage unlawful ab initio, as consanguinity, corporal imbecility, and the like; in which case the

law looks upon the marriage as null and void, being contracted in fraudem legis, and decrees a separation a vinculo matrimonii." Benton v. Benton, 1 Day, 111, 114. The words quoted were taken from 3 Blackstone's Commentaries, 94, and accurately describe the original theory, as to divorce, of English law. That theory, however, is hardly consonant with the divorce statutes of this state. In the form in which they were incorporated in the Revision of 1702 (page 28) these provide "that no bill of divorce shall be granted, to any man or woman lawfully married, but in case of adultery, or fraudulent contract, or wilful desertion for three years, with total neglect of duty: or in case of seven years' absence of one party, and not heard of, after due enquiry is made, and the matter certified to the court of assistants; in which case the other party may be deemed and accounted single, and unmarried: and in that case, and in all other cases, aforementioned, a bill of divorce may be granted by the court of assistants, to the aggrieved party, who may then lawfully marry, or be married again." In Gen. St. 1902, § 4551, fraudulent contract is described as an "offense," and made a cause of divorce; other provisions being made (§ 4562) for pronouncing a marriage void by a decree of nullity.

That the statute prior to our decision in Benton v. Benton was not regarded as limiting divorces on the ground of fraudulent contract to cases of marriages void ab initio is evidenced by the following passages in the first general commentary on the laws of Connecticut: "The reasons of divorce by statute are such as arise subsequent to the marriage, excepting in the case of fraudulent contract. The issue, however, in no case will be bastardized by the divorce, because the marriage is legal and valid till annulled; not absolutely void, but only voidable. * * * By the common law of England, corporal imbecility, frigidity, or perpetual impotency, existing prior to the marriage, was a ground of divorce from the bond of matrimony. In our statutes nothing is mentioned of this reason, though perhaps it may be comprehended under the idea of a fraudulent contract; for we can not form an idea of a greater fraud than for one person to marry another when laboring under a perpetual incapacity to perform the essential duties of the contract. But this point remains to be settled in the future, as no application has ever been made on this ground to the superior court." 1 Swift's System, 192, 193. The point adjudged in Benton v. Benton was that it was no cause of divorce that the man had proposed marriage professedly for love, but really to get release from confinement on bastardy process, which had been sued out by the

woman, and with the design (afterwards executed) of deserting her forever as soon as the marriage was performed. That fraud and false representations of such a kind do not make out a case of fraudulent contract is clear, but the expressions above quoted from our opinion were unguarded in so far as they could be understood as limiting the application of that term to marriages of such a kind as were void ab initio. If by the common law of England at the time of the settlement of this country fraudulent contract would be a cause of nullity, and not of divorce, the legislation of Connecticut has been shaped by a different policy, and leads to a different result. Looking, as our fathers did, on marriage as a civil institution, it was not to be expected that they would follow the mother country in accepting a doctrine which, in placing divorce beyond the reach of civil government, naturally led to giving the widest possible scope to decrees of nullity obtained in the ecclesiastical tribunals. American legislators, working with a free hand, could pay more regard to the interests of injured parties and the protection of the issue of an illegal marriage from the stain of illegitimacy.

The memorandum of decision filed by the court below shows that it felt bound by the decision in Benton v. Benton to rule that the cause of divorce claimed by the plaintiff did not come within the scope of the term "fraudulent contract," because it was not one rendering the marriage void ab initio. This ground is untenable. The fraud which makes the contract of marriage fraudulent, as that word is used in the statute of divorce, is a fraud in law and upon the law. Such a fraud is accomplished whenever a person enters into that contract knowing that he is incapable of sexual intercourse, and yet, in order to induce the marriage, designedly and deceitfully concealing that fact from the other party, who is ignorant of it, and has no reason to suppose it to exist. Whether such incapacity proceeds from a physical or a merely legal cause is immaterial.

The prohibition of the act of 1895 fastened upon the defendant an incapacity, which, if unknown to the plaintiff, and by him fraudulently concealed from her with the purpose thereby to induce a marriage, made his contract of marriage, in the eye of the law, fraudulent. Whether, on such a state of facts, he could ask for a divorce, or would be precluded from thus taking advantage of his own wrong, we have no occasion to determine. The plaintiff could. The superior court has power to pass a decree of divorce from the bonds of matrimony in favor of a party to a marriage, not an epileptic, who has been tricked into it by the other party, who was an epileptic, through his fraud

in inducing a belief that he was legally and physically competent to enter into the marital relation and fulfill all its duties, when he knew that he was not. Guilford v. Oxford, 9 Conn. 321, 328; Ferris v. Ferris, 8 Conn. 166.

Whether the facts found by the court were sufficient to support a judgment in her favor we do not think it necessary or proper to determine upon the present record. The finding was prepared under a misconception of the law, which naturally made it less full and precise on certain points than it would otherwise have been, and the case is of such a character that a rehearing will best serve the interests of justice.

There is error, and a new trial is ordered.

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c. *Age.*

Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. 255, post, p. 80.
Canale v. People, 177 Ill. 219, 52 N. E. 310, post, p. 99.
Parton v. Hervey, 1 Gray (Mass.) 119, post, p. 49.

STATE v. LOWELL.

78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. 358. (1899.)

Habeas corpus proceedings on the relation of Alexander W. Scott in behalf of his wife, Sadie Scott, against her father, Fred L. Lowell, and another. Judgment for respondents. On new trial judgment for relator.

START, C. J.: On October 18, 1899, the relator, Alexander W. Scott, a man 32 years of age, and Sadie Lowell, a girl then only 13 years and 11 months old, the daughter of the respondent Fred L. Lowell, were married, without the consent of her parents, in due form, by an ordained minister of the gospel, upon the presentation of a license in due form, issued by the clerk of the proper county. Cohabitation as husband and wife followed the marriage, but on the next day thereafter the father went to the house of the husband, and forcibly took his daughter away, against her will and wishes, and detained her. Thereupon a writ of habeas corpus in her behalf was sued out of the district court for the county of Hennepin, on the relation of her husband.

Upon a hearing on the return of the writ the court discharged the writ, and remanded the wife to the custody and control of

her father, from which order the relator appealed to this court. The cause was here heard de novo, pursuant to Laws 1895, ch. 327. A referee was appointed to take and report the evidence, who did so. The evidence establishes the facts we have already stated, and, further, that the husband is an industrious man, who has a home, and he is able to support a wife and family, and that his wife is ready and anxious to return to and live with him as her husband, if relieved from the restraint of her father. The wisdom of this marriage, or the propriety of the relator's conduct in inducing this young girl to marry him, are questions which it is not our province to discuss or characterize. Moralize as we may, the fact remains that the parties were married, and the marriage has been consummated; hence we are now simply to inquire dispassionately as to the legal status of the parties. The question presented by the record is, was this marriage void or voidable, and, if the latter, did it emancipate the wife from the custody of her father?

The common law established the age of consent to the marriage contract at 14 years for males and 12 years for females, but our statute (Gen. St. 1894, § 4769) provides "that every male person who has attained the full age of eighteen years and every female who has attained the full age of fifteen years, is capable in law of contracting marriage if otherwise competent." But the statute does not declare that, if a marriage is entered into when one or both of the parties are under the age limit prescribed, the marriage shall be void. It does, however, impose restrictions and penalties upon public officers and clergymen, for the purpose of preventing, so far as possible, such marriages being solemnized; but the statute has, for wise reasons, stopped short of declaring such marriages void. Such being the case, we hold, upon principle and authority, that the marriage of a person who has not reached the age of competency as established by the statute, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterwards if the parties have not voluntarily cohabitated as husband and wife after reaching the age of consent. Gen. St. 1894, §§ 4769, 4786, 4788, 4789; Schouler, Dom. Rel. § 20; 14 Am. & Eng. Enc. Law, 488; 1 Bish. Mar. & Div. § 145; Beggs v. State, 55 Ala. 108; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806; State v. Cone, 86 Wis. 498, 57 N. W. 50. The marriage being voidable, it must be treated as valid for all civil purposes until annulled by judicial decree. Schouler, Dom. Rel. § 14.

Now, the question of the right of the respondent, as father of the relator's wife, to restrain her from going to her husband, must be determined upon the basis that the marriage is valid. The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. 1 Bish. Mar. & Div. § 275; Schouler, Dom. Rel. § 267. The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband can not enforce his marital rights without the consent of the wife, and that she can not, by giving her consent to a voidable marriage, free herself from parental control, and, further, that she can not do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under 12 and over 7 years of age to emancipate herself by consenting to a voidable marriage. This course of reasoning ignores the fact that the marriage, until set aside, must be, for all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife—and this girl must be regarded as such for the purposes of this case—certainly has the capacity to consent to live with her husband. Whether the marriage of a child under 12 years of age and over 7 years would emancipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control.

Our conclusion is that the respondent is not legally entitled to detain his daughter, if she elects to return and live with her husband. Therefore it is ordered that Sadie Scott, the wife of the relator, Alex. W. Scott, be freed from the restraint of her father, the respondent Fred L. Lowell, and that he surrender her to the relator, if she elects to live with him as her husband.

Let judgment be so entered.

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d. *Mental Capacity.*

EICHHOFF v. EICHHOFF.

101 Cal. 600, 36 Pac. 11. (1894.)

Appeal by George Eichhoff from an order granting letters of administration to Magdalena Eichhoff upon the estate of Gustave Eichhoff, deceased. Order affirmed.

HARRISON,, J.: Upon the death of Gustave Eichhoff, Magdalena Eichhoff, claiming to be his widow, applied for letters of administration upon his estate. Her application was resisted by the appellant, a son of the deceased, who also made application that letters of administration be issued to himself. The court granted the application of Magdalena, and denied that of the appellant. The deceased and Magdalena were married May 25, 1882, and from that time lived together as husband and wife until his death in February, 1893. In 1863 he had been married to Milceon Winike, and they had lived in Stockton as husband and wife until 1876, during which time the appellant and five other children were born to them. In 1876 the wife was committed to the insane asylum at Stockton, and she is still living as an inmate of the insane asylum. In April, 1882, the deceased brought an action against her in the Superior Court of Marin County to procure a decree annulling his marriage with her upon the ground of fraud on her part in concealing the fact that she was insane at the time of their marriage, and a decree to that effect was rendered by that court in July, 1882.

Upon the present application for letters of administration the judgment roll in that action was introduced in evidence, and it is claimed by respondent that by virture of this judgment her marriage with the deceased constituted her his lawful wife, while the appellant maintains that it fails to show that the marriage between his mother and the deceased was ever annulled. The judgment roll shows that the complaint was filed April 21, 1882; that on the same day a summons was issued thereon, and that it was returned April 25, 1882, without any proof of service; that on the 17th of July, 1882, after hearing evidence upon the averments of the complaint, the court rendered its judgment "that the marriage between the plaintiff, Gustave Eichhoff, and the defendant, Milceon W. Eichhoff, be, and the same is hereby, annulled, and said parties are, and each of them is, restored to the status and position of unmarried persons."

[The principal ground of appellant's contention was that it did not affirmatively appear that the defendant in the annulment proceedings had been served with process or had appeared in the suit. The court held, however, that it would be presumed in favor of the judgment of nullity that there was proper service although not shown in the record. The opinion thus continues:] This presumption was sufficient to sustain the finding of the court in the matter appealed from herein, that the respondent was the wife of the deceased at the time of his death. The fact that the judgment annulling the marriage between the

deceased and his wife was not entered until July did not invalidate his marriage with the respondent in the previous May. The decree annulling the marriage was a judicial determination of the status of the parties thereto. It did not render the marriage void, but simply declared that it had been void; and the marriage thereby annulled is to be regarded as never having, in fact, existed, except in so far as was necessary to protect the civil rights that others may have acquired in reliance upon its apparent validity. Stew. Mar. & Div. § 141; 2 Bish. Mar. Div. & Sep. § 1596 et seq.; Perry v. Perry, 2 Paige (N. Y.), 501.

The order is affirmed.

WAUGHOP v. WAUGHOP.

(Wash.) 143 Pac. 444. (1914.)

Action by Philip R. Waughop against Nellie Waughop for decree annulling their marriage. Judgment for plaintiff. Affirmed.

GOSE, J.: This is an action to annul a marriage because of the alleged mental incapacity of the plaintiff at the time the marriage ceremony was performed. The plaintiff prevailed below. The defendant has appealed.

The respondent alleges that he was mentally incompetent to enter into a marriage contract when the marriage took place, and that as soon as his competency was restored he ceased to live with the appellant. The appellant answered, denying the respondent's incompetency at the time of the marriage, and alleging: (1) That if he was then incompetent he consummated the marriage by enjoying its privileges after the disability ceased; and (2) that he ratified the marriage after he became competent.

The law presumes sanity rather than insanity, and competency rather than incompetency. It follows that one who asserts his incompetency to enter into a contract, whether it be a contract of marriage or one of another nature, must establish his incompetency at the time the contract was entered into by clear and convincing evidence. Thorne v. Farrar, 57 Wash. 441, 107 Pac. 347, 27 L. R. A. (N. S.) 385, 135 Am. St. Rep. 995.

It is equally well settled that, where one is induced to make a contract by the artifice or fraud of the other party to the contract, less evidence will suffice to annul it. Bishop on Contracts (Enlarged Ed.), p. 390; Bishop on Contracts (2d Enlarged Ed.) § 964.

If the respondent's incapacity was such that he was incapable of understanding the nature of the contract, that is, incapable of understanding the obligations assumed by the marriage, or if he was in a state of mental bewilderment to the extent that he yielded without demur to the suggestion of the appellant and she procured the marriage to be entered into, he has a right to secure its annulment unless he consummated or ratified it after his competency was restored. Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; Dumphy v. Dumphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Hagenson v. Hagenson, 258 Ill. 197, 101 N. E. 606.

"The true test in actions to annul a marriage on account of insanity at the time of the marriage," says Nelson, Divorce & Separation, § 658, "is whether the party was capable of understanding the obligations assumed by the marriage."

It needs no argument to show that, if the respondent was mentally incompetent to enter into the marriage contract, or if he was so mentally deranged that he did whatever the appellant suggested, there could be neither consummation nor ratification so long as the incapacity or the derangement and undue influence continued. Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521; Gillett v. Gillett, 78 Mich. 184, 43 N. W. 1101.

The facts in brief are these: The respondent is a physician 46 years of age, and the appellant is a nurse 30 years of age. The respondent had been for many years afflicted with insomnia, and had at times taken drugs in large quantities to overcome it. His mother, to whom he was greatly devoted, had been ill for some time, and he had been her physician and nurse. Her condition grew worse and he called in Dr. Winslow. On January 26, 1913, her condition was so alarming as to cause the respondent great mental worry. Prior to that date he had casually met the appellant two or three times. On and after that date the appellant visited his home daily, and after a day or two kept him at her sanitarium at nighttime and gave him drugs and hot baths, as she says, to produce sleep. She claims that they became engaged about the 30th of January. He says that he has no recollection of either a courtship or engagement. She kept him under her control until February 4th. On the forenoon of that day they applied for a marriage license, which the auditor, at the suggestion of the respondent's friends, refused to issue. In the afternoon they met at the home of Dr. Powers, who was the respondent's pastor. The respondent was then examined by Drs. Winslow and Nicholson. Dr. Winslow is a specialist in the effect of drugs. Dr. Nicholson has specialized in mental and nervous diseases. They agreed that the re-

spondent was not then mentally competent to enter into the marriage relation, owing to the excessive use of drugs, and so advised the appellant. Dr. Powers had theretofore declined to perform a marriage ceremony because of respondent's mental condition. Despite the advice of the physicians, the advice and protest of Dr. Powers and the earnest protest of the representative's relatives, they procured the license at 11:30 that night and were married at midnight. They lived together at the sanitarium conducted by the appellant from February 4th until February 12th, when the respondent left the appellant. On February 13th he brought this action to annul the marriage.

There is great conflict in the testimony. Drs. Winslow and Nicholson, who examined the respondent a few hours before his marriage, say that he was incompetent to contract at the time of the marriage. A number of his relatives and friends gave like testimony, after detailing the facts which formed the basis of their opinion. On the other side a physician who never saw the respondent until the trial, a number of his friends, and others, say that he was normal. The respondent testified that he had no recollection of either a courtship or a marriage, and that he could recollect very little that occurred between January 26th and February 12th. The appellant admits administering drugs to him, but denies that she gave him enough to produce mental incapacity. All the circumstances of the case corroborate the respondent. He was hardly acquainted with the appellant. If the testimony of a number of witnesses may be believed, he could not remember her name after they became engaged. At least one witness testified that he expressed a fear that she would take his life. The slight acquaintance, the haste in entering into the marriage relation, the subsequent neglect of his mother, who was dangerously ill, the fact that he gave heed to his mother's suggestion that he should marry the appellant, given at a time when, Dr. Winslow says, she was delirious and incompetent, and the further fact that he was taking drugs in large quantities, all point to his incompetency. He seems to have been absolutely dominated by the appellant. Whatever she willed he did. He was mere putty in her hands. She continued to give him drugs until the 9th or 10th of February. On or about the 12th of February, he regained control of his faculties, and at once left her, and took immediate steps to secure an annulment of the marriage.

Measured by the rules we have announced, we think the court correctly decided that the respondent was mentally incompetent at the time of the marriage, and that the marriage was not validated by consummation or ratification. * * *

The judgment is affirmed.

PRINE v. PRINE.

36 Fla. 676, 18 So. 781, 34 L. R. A. 87. (1895.)

Action by Mathew Prine against Lucy Prine for a decree annulling their marriage. Bill dismissed and counsel fees awarded defendant. Affirmed.

LIDDON, J.: The appellant filed his bill in chancery against the appellee in the circuit court to set aside a marriage between them. The grounds upon which the said marriage was sought to be nullified were: That on the 14th day of February, A. D. 1893, the day when the marriage ceremony was performed, and for some days previous thereto, the complainant was and had been in a state of intoxication from the use of ardent spirits; that he was deprived of his reason, and in such mental condition that he did not know what he was about, and was to all intents and purposes non compos mentis, and that the defendant took advantage of his condition, and proceeded to have the marriage ceremony performed; that complainant repudiated the transaction as soon as he became sober enough to realize what had happened, and has ever since refused in any manner, shape, or form to recognize it, and has never since lived or in any manner cohabitated with the defendant, and would never cohabit with her, because she had, for years previous to said marriage, been a person of notorious bad character and reputation. The prayer of the bill was that such marriage be declared null and void ab initio.

The answer of the defendant admitted the marriage, and emphatically and specifically denied all the allegations of the bill as to the intoxication of complainant and his mental condition at the time of the marriage ceremony, and that defendant took any fraudulent or unfair advantage of him, or that he was in any such condition that defendant could have taken any such advantage of him in having the marriage ceremony performed. The answer alleges that at the time of the marriage ceremony the complainant was perfectly sober and compos mentis; that she did not procure the performance of said marriage ceremony, but remained passive while the complainant procured the same. The answer alleges that the complainant knew, before and at the time of the marriage, that the defendant had not been of chaste character, and sets out in considerable detail the circumstances of the courtship and marriage of the parties. The answer also emphatically denied that the complainant had refused to recognize the marriage, or had repudiated the same;

but, on the contrary, expressly alleged that the defendant had in many ways ratified such marriage and consummated the same by cohabitation. The details of acts constituting such ratification and cohabitation were fully set out in the answer. [The court then sets out the substance of these details, and after disposing of the question of alimony and counsel fees, continues:]

We come now to the consideration of the merits of the appeal. Several assignments of error are filed, but the only one argued is that the court erred in rendering the final decree in the case. We will not attempt to set out the testimony taken in the case. To do so would require much space, time, and labor, and not greatly subserve any very useful purpose. Upon the subject of the intoxication of the complainant at the time of the marriage ceremony, the evidence was extremely conflicting. There was certainly testimony which, if believed, proved that the complainant was so much under the influence of intoxicants as to be wholly incapable of entering into any contract. This evidence, however, was contradicted by other evidence, which, if true, showed, if the complainant was intoxicated at all, it was to a very slight extent, and not sufficient to deprive him of the use of his reasoning faculties. Upon this point we can not say that the decree of the court was against the weight of evidence. Repeated acts of cohabitation when the complainant was sober, subsequent to and ratifying the marriage, were proved upon the part of the appellant, and he made no effort whatever to contradict the same. The amount of solicitor's fees allowed by the decree was less than was shown to be reasonable and proper by the undisputed testimony of members of the bar. The decree was in all respects in accordance with the evidence in the case.

As to the law applicable to the facts, it can not be doubted that if the party, at the time of entering into the contract, is so much intoxicated as to be non compos mentis, and does not know what he is doing, and is for the time deprived of reason, the marriage is invalid; but it is not invalid if the intoxication is of less degree than that stated. 1 Bish. Mar., Div. & Sep., § 607 et seq.; Browne, Dig. Div. & A., p. 197. On the other hand, it is equally well established that a marriage, invalid at the time for want of mental capacity, may be ratified and made valid afterwards by any acts or conduct which amount to a recognition of its validity. A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, and this without any new solemnization. Cole v. Cole, 5 Sneed (Tenn.) 57; Sabalot v. Populus, 31 La. Ann. 854; 1 Bish. Mar., Div. & Sep., §§ 614, 624; Browne, Dig. Div. & A., pp. 206, 207.

The appellant, in view of what he calls his unfortunate situation, asks us to take the most favorable view which the law, as applied to all the testimony shown by the record, will permit to be given his case. This we have been inclined to do, but have not been able to reach a different conclusion from that announced by us, without doing violence to the law and the testimony. The situation of the appellant is indeed a peculiar one. He is married to a woman who, the evidence clearly shows, before her marriage, was a public prostitute. The appellant was fully acquainted with her, and her character and reputation. The large allowance against him for alimony and suit money, and the costs decreed against him, make him pay dearly for his folly. By his own rash and reckless conduct he has placed himself in a position from which we, upon this record, have no power to extricate him. The appellant is ordered to pay both the costs of the application for alimony and the costs of appeal.

The petition for alimony, counsel fees, and suit money, except as to court costs, is denied.

The decrees of the circuit court, dismissing the bill of complaint, and awarding counsel fees against appellant, are affirmed.

LEWIS v. LEWIS.

44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. 559. (1890.)

Action by a husband to annul his marriage to defendant. Judgment for defendant. Affirmed.

VANDERBURGH, J.: The statute in reltion to divorces (Gen. St. ch. 62, § 2) provides that "when either of the parties * * * for want of age or understanding is incapable of assenting thereto, * * * the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by sections 4 and 5, as follows: "Nor shall the marriage of any insane person be adjudged void after his restoration to reason, if it appears that the parties freely cohabitated together as husband and wife after such insane person was restored to a sound mind. Sec. 5. No marriage shall be adjudged a nullity at the suit of the party capable of contracting, on the ground that the other party was * * * insane, if such * * * insanity was known to the party capable of contracting at the time of such marriage." There are no

other provisions on the subject of insanity, and no form of insanity or insane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce. The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage.

The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity or not, yet, as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses. Anon, 4 Pick. (Mass.) 32; St. George v. Biddeford, 76 Maine 593; Durham v. Durham, 10 Prob. Div. 80. For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Whart. & S. Med. Jur. (4th Ed.) §§ 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions. In re Blakely's Will, 48 Wis. 294, 4 N. W. 337; Jenkins v. Morris, 14 Ch. Div. 674; 11 Amer. & Eng. Enc. Law, 111, and cases.

The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground. Where one is induced, by deception or stratagem, to marry a person who is under legal disability,

physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to the identity of a person, artful practices and devices, used to entrap young, inexperienced, or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not subsequently ratified, are proper cases for the consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general. Reynolds v. Reynolds, 3 Allen (Mass.) 605, 608; Leavitt v. Leavitt, 13 Mich. 452, 456; 1 Cooley, Bl. 439, and notes. The facts found do not present a case warranting the relief asked.

Judgment affirmed

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e. *Difference of Race.*

Whittington v. McCaskill, 65 Fla. 162, 61 So. 236, post, p. 67.
State v. Bell, 7 Baxter (Tenn.) 9, 32 Am. Rep. 549, post, p. 75.
State v. Ross, 76 N. Car. 242, 22 Am. Rep. 678, post, p. 76.
State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683, post, p. 85.

f. *Prohibitions After Divorce.*

State v. Shattuck, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. Rep. 936, post, p. 86.
State v. Fenn, 47 Wash. 561, 92 Pac. 417, post, p. 91.
Lanham v. Lanham, 136 Wis. 360, post, p. 95.

PHILLIPS (Inhabitants of) v. MADRID (Inhabitants of).

83 Maine 205, 22 Atl. 114, 12 L. R. A. 862, 23 Am. St. 770. (1891.)

LIBBEY, J.: Assumpsit for pauper supplies furnished by the plaintiff town for the relief of Lorestein Hinkley, Ella R.

Hinkley, as his wife, and Barnard C. Hinkley and Harry L. Hinkley, their sons.

By the agreement of the parties, it appears that Lorestein Hinkley had his legal settlement in the defendant town, and the right to recover for what was furnished him is admitted. The right to recover for the supplies furnished Ella R. and the two sons depends upon the legality of the marriage of said Lorestein and Ella R.

By the agreed facts, it appears that said Ella R. was legally married to one Wardwell, of Clinton, in this state, May 25, 1879; that she and her husband afterwards moved to Massachusetts, where they separated, and she returned to this state; that while she was residing here a libel for divorce was commenced by her husband in the court of Massachusetts, duly served on her in this state, and that a decree nisi of divorce was granted by the court there in November, 1882, for the adultery of the wife, which was duly made absolute in November, 1883. Said Ella R. remained in this state, and on the 6th of September, 1884, was duly married to said Hinkley, in said town of Phillips.

It is claimed by the defendants that by the statute of Massachusetts, and of this state, in 1883, a husband or wife for whose fault a divorce was granted could not marry again within two years from the decree of divorce, and as that time had not elapsed when the paupers were married, in September, 1884, their marriage was illegal, and that Ella R. and her two sons do not take the pauper settlement of said Lorestein.

We think this contention is not sound. When the divorce was granted, Ella R. was no longer the wife of Wardwell. Burlen v. Shannon, 115 Mass. 438; Com. v. Putnam, 1 Pick. (Mass.) 136. The prohibition to remarry within the time named was in the nature of a penalty. It had no force as a disability to remarry out of the state of Massachusetts. It did not attach to the person of the wife in this state. This rule is held in many courts. Cox v. Combs, 8 B. Mon. (Ky.) 231; People v. Chase, 28 Hun (N. Y.) 310; Ponsford v. Johnson, 2 Blatchf. (U. S.) 51; Moore v. Hegeman, 92 N. Y. 521; Van Voorhis v. Brintnall, 86 N. Y. 18; Thorp v. Thorp, 90 N. Y. 602; Van Storch v. Griffin, 71 Pa. St. 240; Commonwealth v. Lane, 113 Mass. 458.

Nor does the prohibition upon the guilty party to remarry by the statute of this state attach to said Ella R. Our statute applies only to divorces granted by the courts in this state. It has no reference to a decree granted in another state. Bullock v. Bullock, 122 Mass. 3.

We think the marriage of said Lorestein and Ella R. was legal, and that the plaintiffs are entitled to judgment for the full amount claimed.

Defendants defaulted.

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3. REALITY OF CONSENT.

a. *Duress.*

QUEALY v. WALDRON.

126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374. (1910.)

Suit by Joseph L. Quealy against Imelda Waldron to annul a marriage celebrated between them. Judgment for plaintiff. Affirmed.

LAND, J.: This is a suit to annul a marriage celebrated on the 24th day of February, 1908, between the plaintiff and the defendant, by a Catholic priest, in the city of New Orleans. The alleged ground of nullity is that plaintiff's consent to the celebration was produced by violence and threats used by certain male relatives of the defendant.

The defendant filed an exception of no cause of action, which was overruled, and then pleaded the general issue.

There was judgment in favor of the plaintiff annulling the marriage, and the defendant has appealed.

Early in the morning of February 24, 1908, the plaintiff was assaulted in his office by two armed relatives of the defendant, and was induced by violence and threats to consent to the celebration of a hasty marriage between himself and the defendant. Plaintiff, a young man 24 years old, was escorted by the two armed men to the house of the priest, thence to procure a marriage license and a wedding ring, then to the church, and the escorts were present during the performance of the marriage ceremony. Then the parties separated; the plaintiff going to the house of his father. A month later the present suit was instituted.

The evidence raises not the slightest suspicion of any improper relations between the plaintiff and the defendant, and only an inference that there may have been a promise of marriage between the parties. The legal exclusion of the testimony of the husband and wife, and the failure of the two assail-

ants to testify, leave gaps in the story, commencing with the assault on the plaintiff and terminating with the separation of the parties after the performance of the ceremony.

The contention of the defendant is that, the plaintiff having acquiesced to the marriage ceremony, the marriage was valid, although violence and threats were employed in the beginning to coerce consent. This argument assumes that, after the assault on the plaintiff in his place of business, he reluctantly, but of his own free will, consented to wed the defendant. That the plaintiff seemingly acquiesced in the marriage ceremony is shown by the evidence. On the other hand, the plaintiff contends, and the judge below so held, that this apparent consent was produced by the antecedent threats and violence employed to coerce the will of the plaintiff. This is a fair inference, as the two armd men constantly attended on the plaintiff until after the performance of the marriage ceremony. Plaintiff was separated from his friends, and was surrounded by the relatives of the defendant. The creators of the fear having been present throughout the transaction, it may be assumed that the fear continued and produced the apparent acquiescence of the plaintiff in the marriage ceremony. The immediate separation thereafter of the contracting parties fortifies this conclusion.

The case of Collins v. Ryan, 49 La. Ann. 1710, 22 South. 920, 43 L. R. A. 814, cited by counsel for the defendant, differs widely in its facts from the case at bar. In that case, there was no open threat of violence or hostile demonstration, and, if the language used by the single relative contained an implied threat, it was not of such a nature as to coerce the will of a man of ordinary firmness. Moreover, in Collins v. Ryan, the defendant had been seduced by the plaintiff, who, on being told that he had to marry her, promised to do what was honorable, if given a little time. The court in that case properly held, we think, that the consent, while reluctant and passive, was not forced by threats or violence, but was rather the result of moral pressure. "It is not every degree of violence or every kind of threat that will invalidate a contract; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune." Civ. Code, art. 1851. It is also textual law that "a contract, produced by violence or threats, is void, although the party, in whose favor the contract is made, did not exercise the violence or make the threats," and was "ignorant of them." Id. art. 1852.

The law considers marriage in no other view than a civil contract. Civ. Code, art. 86. No marriage is valid to which the parties have not fully consented, and "consent is not free"

"when it is extorted by violence." Id. art. 91. Violence may be physical or moral; that is to say, it may consist of the coercion of the person continuing down to the moment of the celebration of the marriage, or of the coercion of the will by antecedent threats of bodily harm. In the latter case, the person is forced to elect between consenting to marry and exposure to the threatened evils. Such a forced consent does not bind the person who has been constrained to choose the alternative of marriage. Baudry-Lacantinerie, Droit Civil, vol. 2, Nos. 1714, 1715.

The question whether the violence employed in a particular case is sufficient to annul the marriage is in its nature one of fact left entirely to the appreciation of the judge. Carpentier-Du Saint, Repertoire, etc., vol. 27, p. 328, No. 132.

We agree with the judge a quo that the violence employed in the instant case was sufficient to constrain the will of the plaintiff and to vitiate his consent to the marriage.

Judgment affirmed.

GRIFFIN v. GRIFFIN.

130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866. (1908.)

Action by John E. Griffin against Lilla Griffin and others to annul a marriage and cancel a bond given for the purpose of stopping a prosecution for seduction. Judgment for defendants. Affirmed.

EVANS, P. J.: The plaintiff, against whom a warrant for seduction had been issued, stopped the prosecution by marrying the female alleged to have been seduced, and by giving the statutory bond. Section 388 of the Penal Code of 1895 provides that a prosecution for seduction "may be stopped at any time by the marriage of the parties, or a bona fide and continuing offer to marry on part of the seducer: Provided, that the seducer shall at the time of obtaining the marriage license from the ordinary of the county of the female's residence give a good and sufficient bond in such sum as said ordinary may deem reasonable and just, taking into consideration the condition of the parties, payable to said ordinary and his successors in office, and conditioned for the maintenance and support of the female and her child or children, if any, for the period of five years. If the defendant is unable to give the bond, the prosecution

shall not be at an end until he shall live with the female, in good faith, for five years."

The plaintiff seeks in this proceeding to have his marriage annulled and the bond canceled because of the conduct of his wife and her father alleged in the petition. He contends that the circumstances under which he married amounted to duress. "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." Civ. Code 1895, § 3536.

The facts relied on to constitute duress are the assertion by Ragsdale to the plaintiff's father that Ragsdale's daughter had been seduced by the plaintiff, and that Ragsdale intended to prosecute the plaintiff for seduction unless the plaintiff married her, and that the neighbors of Ragsdale had made up a large sum of money to be employed in the prosecution; that after the warrant had been issued the plaintiff's father communicated these matters to him, and advised and commanded him to stop the prosecution by marrying the woman alleged to have been seduced, and giving the bond required by the statute in such cases.

There is no charge that the warrant was illegally issued, or that the money which was to be contributed by the neighbors was to be unlawfully employed in the aid of the prosecution. Nor is it alleged that any force or threat of personal violence was used to induce the plaintiff to marry. On the contrary, it appears that when his father received information that Ragsdale intended to prosecute him, and had caused a warrant to be issued, the father advised with the son as to the best course to pursue. In that conference the plaintiff protested his innocence. The father had previously taken legal advice, and told his son that the Ragsdales' standing was such that they would convict him; that is, that a jury would likely believe their testimony. Two courses were open to him: Either to face a trial and abide its legitimate consequences, or to stop the prosecution in compliance with the statute. The plaintiff's conduct shows that he made his election not because of any demand of Ragsdale, but to avail himself of the statute, to escape the consequences of a prosecution for seduction. Force, to constitute duress in law, must be unlawful; and a man lawfully arrested on a warrant for seduction, who, to procure his discharge, marries the woman, can not have the marriage declared void, as procured by duress. 1 Bishop on Mar., Div. and Sep. § 543; Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. 191;

Lacoste v. Guidroz, 47 La. Ann. 295, 16 So. 836; Johns v. Johns, 44 Tex. 40; Williams v. State, 44 Ala. 24; Sickles v. Carson, 26 N. J. Eq. 440. It would be a travesty of law for a man to be able to avoid a criminal prosecution for seduction by virtue of a statute allowing him to do so, and then be permitted immediately thereafter in a court of equity to set aside the marriage on the ground that he subsequently discovered evidence to disprove the charge brought against him.

The validity of the marriage is further attacked on the ground of fraud. The alleged fraud is that the Ragsdales at the time of preferring the charge of seduction against him knew that the woman was not virtuous, and that he did not discover, until some time after his marriage, that some three years previously she had committed fornication with a certain person named in the petition. The plaintiff admits that at the time of marriage he was informed that his wife was pregnant, but denies that he had carnal knowledge of her up to that time. If it be true, as he so positively affirms, that he had never carnally known his wife prior to his marriage, then her pregnancy gave him indubitable information that she was not a virtuous woman, notwithstanding the representations to the contrary. With such knowledge he can not be considered as deceived by the representations as to his wife's virtue. * * *

Judgment affirmed. All the justices concur.

SHORO v. SHORO.

60 Vt. 268, 14 Atl. 177, 6 Am. St. 118. (1888.)

Petition by a husband to have the marriage of himself and defendant annulled on the ground that his consent was obtained by force and fraud. The state statutes (Vermont R. L. § 2349) provide that "The marriage contract may be annulled when * * * the consent of either party was obtained by force or fraud." Petition dismissed. Reversed.

ROSS, J.: This is a petition to have the marriage solemnized between the parties annulled, alleging, among other things, that the petitioner's consent was obtained by force and fraud. It comes to this court on the facts found by the county court, and the exceptions of the petitioner to the refusal of the county court to annul the marriage. We have given the matter somewhat careful attention, both because the marriage contract is

one in which the public generally is interested, and because no attorney has appeared for the petitionee.

The controlling facts found by the county court are that the petitioner, a lad 16 years old, never had sexual intercourse with the petitionee before or after the performance of the marriage ceremony, and never cohabitated nor lived with her. She was older, of bad repute for chastity, and, without probable cause, maliciously caused him to be arrested upon bastardy proceedings. He was greatly frightened by the arrest, protested his innocence, but was told by the officer he must get bail or go to jail. He applied to his father to bail him, and was refused. The father told him to marry her or go to jail, and advised him to marry her, and not live with her. When protesting his innocence to the officer, the officer assured him that would not save him. He took his father's advice, went through the marriage ceremony performed by the magistrate who signed the warrant for his arrest, while under arrest, in the presence of the officer, and while greatly frightened, with the fixed intention of never living with her, which he has fully carried out.

Can there be a doubt that the marriage ceremony was procured by duress? What is duress? Says Mr. Bishop, (1 Mar. & Div. § 210): "Where a consent in form is brought about by force, menace, or duress,—a yielding of the lips, but not of the mind,—it is of no legal effect." Bac. Abr. under the title "Duress:" "If a man takes A. S. to wife by duress, though the marriage be solemnized in facie ecclesiæ, yet it is merely void, and they are not husband and wife, for without free consent there can be no marriage." Again he says: "It seems clearly agreed that where a person is illegally restrained of his liberty, by being confined in the common jail, or elsewhere, and during such restraint enters into a bond or other security, to the person who causes the restraint, he may avoid the same for duress or imprisonment." Mr. Bishop, in § 213, gives a case agreeing in its facts with the facts found by the county court in the case at bar, except the arrest was made without warrant, in which the marriage was annulled for duress. He intimates that, if the arrest was on a legal process, it would be otherwise. No doubt that would be true if by "legal process" he means is "issued for legal cause." But, as to the petitioner, the process on which she caused his arrest was a pretense,—a fiction,—because procured maliciously, and without probable cause. If anything, it was worse than an arrest without process, but claiming to have one. Mr. Bishop (§ 212) says: "A doubt may be entertained whether a process would not be void, if shown to be both malicious and without probable cause." But

illegal pretense, as it was so far as regards the petitioner, it accomplished her wicked and unlawful purpose,—frightened the boy, and caused him to consent to the performance of the marriage ceremony in form only,—a yielding of his lips, but not of his mind. Sartwell v. Horton, 28 Vt. 370, and Hoyt v. Dewey, 50 Vt. 465, are full authority that money procured by a threatened arrest, on a charge which the maker knows to be false and without foundation in fact, may be recovered back. In Sartwell v. Horton the case of Duke of Cadaval v. Collins, 4 Adol. & E. 858, is cited with approval. The case and decision is stated as follows: "That was an action to recover money paid to the defendant after the plaintiff had been served with process. The fact was found by the jury that the defendant knew that he had no claim upon the plaintiff when he sued out his writ. Coleridge, J., observed that "no case has decided that when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law." Patteson, J., observed that "the jury concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained by such extortion can not be recovered back would be monstrous."

Much more monstrous, in our judgment, would it be to hold that a boy only 16 years old, whose verbal consent to a marriage ceremony had been extorted by the use of a process known to be without probable cause, and used maliciously, instigated and set on foot by an unchaste, pregnant woman of mature age, can not be relieved from the lifelong bondage of such a wife. The judgment of the county court is reversed, and the pretended marriage annulled and vacated.

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b. *Fraud.*

Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531, ante, p. 2.

LYON v. LYON.

230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 966, 12 Ann. Cas. 25. (1907.)

Suit by James A. Lyon against Susanne B. Lyon for an annulment of their marriage on the ground of fraud. The par-

ties were married in 1904. Plaintiff had known defendant for sixteen years and had learned that she had been subject to epileptic attacks, but at the time of their engagement defendant represented to plaintiff that she was entirely cured and had had no attack for more than eight years. Relying on this representation plaintiff married defendant. After cohabiting with her for several months plaintiff learned that her representations were false; that defendant had been subject to attacks of epilepsy at intervals for more than ten years prior to their marriage, and suffered several attacks after the marriage, and that she was incurable. Whereupon plaintiff at once ceased to cohabit with defendant and returned her to her parents in New York state, where the marriage had taken place. The plaintiff alleged the statute of New York providing that a marriage may be annulled in case the consent of one of the parties was procured by fraud. Upon demurrer the bill was dismissed for want of equity. Affirmed.

DUNN, J.: Appellant's claim is that the rights of the parties are to be determined by the law of New York, where the marriage was contracted, and that by such law this marriage was subject to be annulled for fraud. Fraud in the state of New York is not different, we presume, from fraud elsewhere. If the bill does not charge conduct which we would hold fraudulent, we can not assume that the courts of another state would do so. The bill alleges that the statutes of New York provide that the marriage may be annulled if appellant's consent was obtained by fraud. Our inquiry is, therefore, whether the bill shows that appellant's consent was obtained by fraud, and the allegation will be construed according to the law of Illinois. It is not alleged that any different definition of fraud has been established by statute or prevails in New York, or that the statute declares that a marriage may be annulled for a misrepresentation in regard to the health of one of the parties.

The fraud charged is that the appellee falsely represented that she was entirely cured of her epilepsy and had had no attack of it in eight years. So far as her being entirely cured was concerned, that was essentially a matter of judgment and opinion. The false representation of fact was that she had had no attack of the disease for eight years. "As to fraud, in order to vitiate a marriage, it should go to the very essense of the contract. * * * Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament can not, therefore, vitiate the contract. Caveat emptor is the harsh, but necessary, maxim of the law." Schouler

on Domestic Relations, par. 23. "In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better or worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or, indeed, generally, from fraudulent practices in respect to the character, fortune, health, does not render void what is done. To this conclusion the authorities all conduct us, but different modes of stating the reason for it have been adopted. Thus, the qualities just mentioned are said to be accidental, not going to the essentials of the relation; and Lord Stowell, after remarking that error about the family or fortune of an individual, though produced by disingenuous representations, does not affect the validity of the marriage, adds: 'A man who means to act upon such representations should verify them by his own inquiry. The law presumes that he used due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for relief of a blind credulity, however it may have been produced.'" 1 Bishop on Marriage and Divorce, par. 167. "It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as to his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent's Commentaries, 77. "The degree of fraud sufficient to vitiate an ordinary contract will not afford sufficient ground for the annulment of a marriage. It is not sufficient that the party relied upon the false representations and was deceived, or that important and essential facts were concealed with intent to deceive. The marriage relation is a status controlled and regulated by considerations of public policy, which are paramount to the rights of the parties. * * * The fortune, character, and social standing of one of the parties are not essential elements of marriage, and it is contrary to public policy to annul marriages for fraud or misrepresentation as to such personal qualities." 19 Am. & Eng. Ency. of Law (2d Ed.) 1184.

Concealment of the fact that the woman had previously been insane has been held insufficient to justify a decree of nullity of marriage. Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131. So has concealment of kleptomania. Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. 559. Also concealment by a woman of unchastity prior to marriage. Leavitt v. Leavitt, 13 Mich. 452; Allen's Appeal, 99 Pa. 196, 44 Am. Rep. 101; Varney v. Varney, 52

Wis. 120, 8 N. W. 739, 38 Am. Rep. 726. Also concealment of a prior marriage. Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892; Fisk v. Fisk, 6 App. Div. (N. Y.) 432, 39 N. Y. S. 537. Also concealment of the birth of an illegitimate child prior to marriage. Farr v. Farr, 2 MacArth. (D. C.) 35; Smith v. Smith, 8 Ore. 100.

The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation—of something making impossible the performance of the duties and obligations of that relation, or rendering its assumption and continuance dangerous to health or life. Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833; Cummington v. Belchertown, supra.

The case of Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531, is not inconsistent with these rules, although it was there held that concealment of epilepsy was such a fraud as would justify a decree of divorce under the statute of that state forbidding marriage or sexual intercourse by or with an epileptic under penalty of imprisonment. The court said that a fraud was accomplished "whenever a person enters into that [marriage] contract knowing that he is incapable of sexual intercourse, and yet, in order to induce that marriage, designedly and deceitfully concealing that fact from the other party, who is ignorant of it and has no reason to suppose it to exist. Whether such incapacity proceeds from a physical or a merely legal cause is immaterial. The prohibition of the act of 1895 fastened upon the defendant an incapacity which, if unknown to the plaintiff and by him fraudulently concealed from her with the purpose thereby to induce a marriage, made his contract of marriage, in the eye of the law, fraudulent. * * * The superior court has power to pass a decree of divorce from the bonds of matrimony in favor of a party to a marriage not an epileptic, who has been tricked into it by the other party, who was an epileptic, through his fraud in inducing a belief that he was legally and physically competent to enter into the marital relation and fulfill all its duties, when he knew that he was not." The Supreme Court of New York, in Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609, held that the representation by a woman to a man that she had given birth to a child of which he was the father and which she purported to exhibit to him, when in fact she had not given birth to a child, was such fraud as to justify the annulling of a marriage brought about thereby. This representation is similar in kind to that of a pregnant

woman, who induces a man with whom she has had illicit intercourse to marry her by the false representation that he is the father of her child. But such representation, under such circumstances, does not constitute fraud for which the marriage will be annulled, and we regard the decision in the Di Lorenzo case as opposed to the weight of authority. Franke v. Franke, 96 Cal. 17, 31 Pac. 571, 18 L. R. A. 375; Foss v. Foss, 12 Allen (Mass.) 26; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98.

The statute of New York mentioned in the bill merely declares the law as it exists in Illinois—that a marriage procured by fraud may be annulled. The kind and degree of evidence required for such purpose must be determined by the court in which the suit is brought, according to the law of the forum. The bill proceeds on the theory that the appellant's consent to the marriage was obtained by fraud, and sets out the facts constituting the fraud. Whether those facts constitute fraud must be determined by the law of the forum, and the superior court did not err in sustaining the demurrer to the bill. Its decree, and the judgment of the Appellate Court in affirmance thereof, will be affirmed.

Judgment affirmed.

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4. FORMALITIES OF CELEBRATION.

a. *Common-Law Marriage.*

HULETT v. CAREY.

66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. 419. (1896.)

Proceedings for the settlement of the estate of Nehemiah Hulett. Lucy A. Hulett presented petitions for an allowance of homestead to her as Hulett's widow and for the vacation of the probate of his will on the ground that it had been revoked by his marriage to her subsequent to its execution. Judgment in her favor on both petitions.

Mr. Hulett, for many years a resident of St. Louis county, Minn., and generally supposed and reputed to be a bachelor, died July 25, 1892. The petitioner claimed to have become his wife by virtue of a written contract as follows:

"January 6, 1892. Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife,

and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written. [Signed] N. Hulett. L. A. Pomeroy."

The principle question before the court was whether there had been a valid marriage between the parties. The lower court held that the marriage was valid and this decision was upheld by the Appellate Court, which affirmed the judgment setting aside the homestead for the petitioner, but reversed the judgment setting aside the probate of the will on the ground that the marriage, though valid, had no such effect.

MITCHELL, J.: * * * The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabitated together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged.

Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although in verba de præsenti, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect.

Marriage is a civil contract jure gentium, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made per verba de præsenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Comm. p. 87; 2 Greenl. Ev. § 460; 1 Bish. & Mar. Div. §§ 218, 227-229. The maxim of the civil law was "Consensus non concubitus facit matrimonium." The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bish. Mar. Div. & Sep. §§ 239, 313, 315, 317. See, also, the leading case of Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, which is the foundation of much of the law on the subject.

An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. Dalrymple v. Dalrymple, supra. The only two cases which we have found in which anything to the contrary was actually decided are Reg. v. Millis, 10 Clark & F. 534, and Jewell v. Jewell, 1 How. 219; the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

Counsel for appellants contend, however, that the law is otherwise in this state; citing State v. Worthingham, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, per verba de præsenti, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents"; citing Hutchins v. Kimmell, 31 Mich. 126. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed per verba de præsenti to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the court was merely

stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage. In State v. Worthingham, supra, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it. The case of Hutchins v. Kimmell, supra, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation"; but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and Id., 79 Cal. 633, 22 Pac. 26, 131, is not in point, for the reason that § 55 of the civil code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations." In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do. * * *

[Judgment affirmed in part and reversed in part.]

HEYMANN v. HEYMANN.

218 Ill. 636, 75 N. E. 1079. (1905.)

Suit for separate maintenance by Jennie Heymann against Albert Heymann. Defendant denied the marriage. Judgment for plaintiff. Affirmed.

MAGRUDER, J.: In deciding this case the Appellate Court expressed the following views:

"Appellee contends in her will and by her own testimony, supported by the testimony of several witnesses and a sworn schedule made by appellant, that there was a marriage contract between appellant and herself per verba de præsenti, followed by cohabitation and living together as husband and wife for a period of six years. Appellant, on the other hand, denies any such contract. He denies any intimate relations with appellee, and claims that his presence in the same house or apartment with her was as a roomer or boarder. The issue here is whether the parties were married, no ceremony having been performed. Appellee avers in her bill that she was married to appellant in August, 1896, without a marriage ceremony. In her testimony appellee says that in April, 1896, appellant, having rented a furnished room of her for some time previous thereto, and being about to go to Lake Geneva, where he had an engagement as a musician, proposed marriage to her; that she postponed the matter until he should return from Lake Geneva; that he wrote to her from Lake Geneva repeatedly, and sent her money in letters to rent a flat, and requested her to give up keeping boarders.

In accordance with his suggestions she rented a flat at the corner of Wood and Division streets, in Chicago, and moved into it; that appellant returned from Lake Geneva in August, 1896, and the subject of marriage was again talked over between them. In the course of the conversation, and in answer to appellee's question as to the form of marriage in this country, appellant stated to her that it was not necessary to get married, conveying to her the impression apparently that no marriage ceremony was necessary. He said to her: 'I give you my word of honor we can stay man and wife. I am your husband, and I am satisfied.' Appellee then said that they would have to go to a judge, and appellant replied that his word was better than a judge's word. Appellee stated that she knew what marriage was in the old country, but that she supposed what he said was true; that he promised her to be her husband, and she consented. This was the substance of their conversation. Thereupon they occupied the same bed that night, and lived together as husband and wife for six years, until appellant left her. * * *

"To enter into an analysis or full discussion of the evidence here would extend this opinion beyond reasonable limits. We have studied carefully the evidence contained in the record,

and we think it preponderates in favor of the contention of appellee that there was a marriage contract between appellant and appellee per verba de præsenti, which was immediately followed by cohabitation as husband and wife. There is no question in the case of the capacity of the parties to enter into the marriage relation. Nor is there any contention that the parties were living in a meretricious state before August, 1896, the date of the marriage contract and the cohabitation that followed it. While appellant has denied substantially everything that appellee and nearly every witness on her behalf testified to, his evidence does not go to the extent of showing that they at any time lived together in clandestine sexual intimacy. No doubt, therefore, is thrown upon the marriage contract, as testified to by appellee, by reason of the contract having been entered into through the door of a previous illicit intercourse.

The proof in this case brings it clearly within the law, as announced by our Supreme Court in Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105, and the authorities there cited. In the above case it is said: 'While our statute prescribes certain formalities to be observed in marriages, and certain steps to be taken to preserve the evidence of their celebration, it does not declare a marriage void which is legal at the common law, merely because not entered into in accordance with its provisions. Port v. Port, 70 Ill. 484. A marriage is a civil contract made in due form, by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. Each must be capable of assenting, and must in fact consent to form this new relation. If a statute forbids the solemnization of marriage without a license, still, in the absence of a clause of nullity, the marriage will be good, though no license was had.'

No particular form of words is necessary to constitute a common-law marriage. If what is done and said evidences an intention by the parties to assume the marriage status, and the parties thereupon enter into the relation of husband and wife, that is sufficient, whatever may be the form of expression used. Stewart on Marriage and Divorce, § 86.

The clear preponderance and weight of the evidence show all the necessary legal elements of a marriage, as contemplated by the law of this state. This was the view and conclusion of the learned chancellor, who heard the witnesses and observed their character and manner of testifying. His conclusions upon

the evidence are entitled to weight. The decree of the superior court accords with the law and the facts of the case, and must be affirmed."

We concur with the views above expressed in the opinion of the appellate court, and accordingly the judgment of the appellate court is affirmed.

Judgment affirmed.

ELZAS v. ELZAS.

171 Ill. 632, 49 N. E. 717. (1898.)

Suit by Ada Elzas against Simon L. Elzas for divorce. Decree for plaintiff. Affirmed.

CARTWRIGHT, J.: Appellee filed her bill in the Circuit Court of Cook County against appellant for a divorce, on the ground of desertion. Appellant answered the bill, denying its allegations, and especially denying that he was ever legally or lawfully married to appellee. There was a hearing of the issues before the court, and they were found for appellee, and a decree was entered divorcing the parties, and awarding the custody of their child, Allen L. Elzas, to appellee. From that decree an appeal was taken to the Appellate Court for the First District, where it was affirmed.

The main dispute at the hearing was, and now is, over the question whether the parties ever entered into a legal contract of marriage. There was no ceremony or public solemnization of the contract between them, but complainant's claim was that on September 15, 1885, they entered into a valid contract of marriage. When parties come together and agree by a present contract to accept each other as husband and wife and enter into the marriage relation, such a contract will be valid and lawful, although not solemnized according to the provisions of the statute. The relation between the parties is always a matter of evidence, and may be proved by records or any other evidence sufficient to establish the fact; and, if it is shown that parties intending marriage have accepted each other as husband and wife, the contract will be enforced. Port v. Port, 70 Ill. 484; Hebblethwaite v. Hepworth, 98 Ill. 126.

Defendant was a gambler, and lived in Chicago, and also followed running races in various places. At the time of the marriage, complainant was 18 years of age, and was, and for some time had been, an inmate of a house of ill repute in that

city. The direct proof of the marriage consisted of her testimony to the fact, and the testimony of her sister to defendant's statements and admissions. Complainant testified that she and defendant had known each other a little over a year at the time of the marriage; that he had professed great regard for her, and had spoken of taking her away from the house where she was, and having her lead a different life; that he had asked her if she thought enough of him to be his wife, and she told him that she did; that he had asked her to consider and think it over, and let him know if she made up her mind definitely what to do; and that she had seen him daily for a month previous to the time when he came to her and the agreement was made. What occurred at that time she narrated as follows: "He said: 'Ada, I think you think a great deal of me. I do of you, and will you take me as your husband? I want you to settle it. You said you would consider it.' I said: 'Yes; I think enough of you, Sam, to live with you and be your wife.' And he said: 'Well, from this time I want your consent, and will you accept me as your husband? And if so, I will take you as my wife.' And I said: 'Yes; I will.' I said: 'Who will we get to marry us? I was always brought up an Episcopalian, and that church calls for a ceremony.' He said: 'There is no ceremony necessary. I am a Jew, and you are a Gentile. It would not be more legal if a ceremony was performed. It is only a contract. I agree to take you as my wife, and then we will be husband and wife.' And he then gave me the ring I have. I then consented to be his wife." She testified that he then told her to leave that house at once; she asked where they should go, and he told her to pack up her trunk, and get out at once; that she said, "Very well," and immediately gathered up her things; and that they took rooms in a house on Wabash avenue, where they lived until April 27, 1886, when she went to her father's residence, at Toronto, Canada, to remain for a time. This visit to Canada was by mutual agreement of the parties, and while there the boy, Allen L. Elzas, was born, July 18, 1886. The statement and admission of defendant as to the marriage contract were testified to by Minnie Bailey, complainant's sister, as follows: "One evening we were sitting in the parlor, and he spoke of having a circumcision performed on the child, as he was a Jew, and my sister objected, and he said: 'That is my wish. I want it done.' My sister said: 'Sam, you want your way in everything.' And she was quite indignant, and she said: 'When we were married, we were married without a ceremony, and I do not believe in having him circumcized.' And he said to me: 'Minnie, when we were married, we were married

without a ceremony.' 'I said: 'As an Episcopalian, we believe in ceremony.' He said: 'I am a Jew, and your sister is a Gentile, and it is not necessary. She is my legal wife as much as though we were married by a rabbi. She had a ring from me.'" This ring was worn by the complainant after the marriage. From the time of the removal to Wabash avenue, when the parties began living together, they resided in that place and Hyde Park and other localities in Chicago openly as husband and wife until his desertion of her, in March, 1891. There was disinterested evidence that they were so regarded, and that she introduced him as her husband, and that he spoke of her as his wife, and she testified that he introduced her as such. [The court reviews the testimony and continues:]

Her testimony on this hearing was corroborated, and the evidence was sufficient to establish the relation claimed. It is true that the relation between the parties was in its inception meretricious and not matrimonial, and that a relation so commenced will be presumed to continue of the same character in the absence of proof of a change in its nature; but the parties might assume legitimate and proper relations, and should be commended for doing so, and it is, of course, admissible to show that such a change took place. In this case there was an immediate change when the contract was made. She packed up her things, and they moved to a respectable place, and afterwards lived in decent and respectable places. He deserted her, without cause, in March, 1891. * * *

The judgment of the Appellate Court is affirmed. Judgment affirmed.

HUTCHINSON v. HUTCHINSON.

196 Ill. 432, 63 N. E. 1023. (1902.)

Suit by Jennie C. Hutchinson against Charles G. Hutchinson for separate maintenance. The main question was whether the parties were married. Decree for plaintiff. Affirmed.

BOGGS, J.: * * * The parties were never united in marriage by any ceremonial or public solemnization of the marriage rite between them. The finding of the circuit court was that they came together and agreed by a present contract to accept each other as husband and wife, and thereafter entered into the marriage relation and lived and cohabited together as husband and wife. The appellant admitted the co-

habitation substantially as charged, conceded he had become the father of four children born to the appellee as the result of such cohabitation, but denied that any contract of marriage, in verba de præsenti or otherwise, had ever been entered into between them, or that any undivided repute of such marriage ever existed, but insists that his intercourse with her was purely meretricious and never matrimonial. The relation between them at its inception was illicit. It began in the year 1867, while appellee, a young girl, was a servant in the home of appellant's father, in the city of Chicago. The appellant, then a young man, made his home with his father. Appellee became pregnant with child, the fruit of their illicit intercourse. She testified he then promised to make her his wife, and fixed a time when they would be married. He, however, went away from his home, and she went to the home of her sister, and instituted proceedings in bastardy against him, which he, with the aid of his father, settled by payment to her of $100 in cash and giving to her nine notes, each for the sum of $50, one of which fell due each year thereafter for nine years. Appellee was delivered of this child on the 8th day of July, 1868. The child was a daughter, and was given the mother's name, which was Jennie. Soon after the birth of this child the parents resumed their illicit intercourse, which continued until the year 1874, when appellee again became pregnant.

The appellee testified that during this time the appellant made repeated promises of marriage, and that when it became evident that she was again pregnant with another child of which he was the father she insisted that the second child should not be born out of lawful wedlock; that he consented, and that a contract of marriage was verbally entered into between them in the month of April, 1875. Her testimony as to this contract of marriage was as follows: "Why, Mr. Hutchinson came to see me one evening. I felt rather blue and downhearted. He asked me what was the matter, and I said, 'You know what is the matter.' He said, 'I do.' He says, 'Is that all?' I said, 'Yes.' He looked at me for awhile, and he says, 'Jennie, are you willing to be my wife?' I said, 'Yes.' He took a ring out of his pocket, and he placed it on my finger, and he said, 'I now take you for my wife.' I said, 'I now take you for my husband.' He put his arms around my neck and kissed me, and he said, 'Are you satisfied with that?' I said, 'Yes.' He says, 'From this night we are husband and wife.' 'Now,' he says, 'You go and get a flat, and we will go housekeeping.' I says, 'I can not leave mother just now, because she is on the point of death.' 'Well,' he says, 'as soon as you can.' I says, 'All right.'" Appellant

denied these statements of the appellee, but the chancellor, who saw them both and heard them both testify, accepted her version as being true. [The court reviews the evidence showing the cohabitation of the parties as husband and wife after this contract until his abandonment of her in 1884.]

Our conclusion is, all of the elements necessary to a valid common-law marriage—a contract per verba de præsenti, followed by cohabitation matrimonial in character and intent and a full assumption of the marriage status in every legal aspect—were established by the proofs. Port v. Port, 70 Ill. 484; Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Laurence v. Laurence, 164 Ill. 367, 45 N. E. 1071; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631. The abandonment of the wife and children was shown to be without just cause.

The equities were with the appellee, and the decree is eminently just and proper. It is affirmed. Decree affirmed.

LAVERY v. HUTCHINSON.

249 Ill. 86, 94 N. E. 6. (1911.)

Suit by Marion J. Lavery against Douglas W. Hutchinson, executor of the estate of Charles G. Hutchinson, deceased, and others. Plaintiff claimed certain real estate, by mesne conveyances, under a deed by said decedent, executed by him as a bachelor, he being, however, married by a common-law marriage. The plaintiff prayed among other things that the widow's dower right in the premises be ascertained and adjusted. The executor contended that a common-law wife was not entitled to dower. Decree for plaintiff. Affirmed.

COOKE, J.: * * * As to the second contention, it having been determined in Hutchinson v. Hutchinson, 196 Ill. 432, 63 N. E. 1023, that the relationship of husband and wife existed between Charles G. Hutchinson and Jennie C. Hutchinson by virtue of a private contract or common-law marriage, it only remains to be determined what rights a wife acquires by virtue of such a marriage in this state. Under the laws of this state as they existed at the time of the marriage of Charles G. Hutchinson and Jennie C. Hutchinson, in 1875, a wife by a common-law marriage secured all the rights that she would

have secured had the marriage been performed in the method prescribed by statute.

It is contended that in England, under the old common law, the wife by common-law marriage did not have the right of dower, and as the common law of England has been adopted as the law of Illinois, except where modified by statute, the wife by such a marriage is not entitled to dower in this state. It is true that in England, by the ancient common law, the wife by a common-law marriage was not entitled to dower. That contract of marriage, however, was binding and indissoluble. The ecclesiastical courts of England had exclusive jurisdiction to determine the question of the legality of a marriage, and as a result of the holdings of that court the wife of such a marriage was not entitled to dower, and the children of the marriage were illegitimate. The marriage relation so entered into was thus robbed of most of the essential incidents which attached to it when entered into according to the methods prescribed by the ecclesiastical law. The husband or wife of such a marriage could, by bringing suit in the spiritual court, compel the other to solemnize the marriage in the manner prescribed by that tribunal, and the evident design of the ecclesiastical court was to make it compulsory upon such persons as should enter into a private contract of marriage to solemnize the marriage according to the rules and regulations prescribed by the church. 1 Scribner on Dower, ch. 6.

In this state, there being a separation of church and state, we have no court which corresponds to the old spiritual or ecclesiastical court of England, and we have not adopted, without modification, the rule of the common law on this subject. Accordingly, we have held that the children of a common-law marriage are legitimate and are the legal heirs of their father. Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631. Every marriage in this state is a marriage for all purposes and is attended with all the civil rights and obligations which the law confers and imposes upon persons who enter into the marriage relation. Jennie C. Hutchinson is entitled to dower in all the lands of which her husband, Charles G. Hutchinson, was seised during coveture, provided she had not released or barred her claim to such dower, and, as he conveyed these premises during coverture, the wife failing to join in the conveyance, she is entitled to have her dower assigned in the same. * * *

We find no error in the decree of the circuit court, and the same is affirmed.

Decree affirmed.

ESTATE OF GRIMM.

131 Pa. St. 199, 18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. 796. (1890.)

Petition of Mary Grimm for allowance as the widow of Gottfried Grimm. Claim disallowed. Affirmed.

PAXSON, C. J.: This case is peculiar. The appellant filed her petition in the court below, claiming to be the widow of Gottfried Grimm, and asking that $300 worth of property be appraised and set apart to her out of the estate of said decedent. The court below disallowed her claim. The evidence upon which her claim to widowhood was based amounts to this: That the appellant and the deceased cohabited together as man and wife for one week prior to the death of the latter; that the marriage ceremony was to have been performed the following week, but that it was prevented by the sudden death of the decedent. The appellant was sworn and examined under objection, and her testimony was as follows: "I knew Gottfried Grimm since last Christmas. We lived together as man and wife a week before he died. The arrangement between us was that everything that was his should be mine, and my children get $300 each. We cohabited as man and wife. He acknowledged me in presence of others as his wife. The ceremony was to be performed the next week after he died. He was to have everything fixed the next week, and we were to have been married the Tuesday after he was killed. He was to get the license. We lived together, and he treated me as a wife, from the time he came over."

In the face of this clear statement that no marriage had taken place, the mere fact that Mr. Grimm acknowledged her as his wife in the presence of witnesses has little significance. Neither cohabitation nor reputation of marriage is marriage. When conjoined, they are evidences from which a presumption of marriage arises. Yardley's Estate, 75 Pa. St. 207. "The presumption of marriage arising from such facts may always be rebutted, and wholly disappears in the face of proof that no marriage in fact had taken place. Again, the cohabitation was illicit at its commencement. It may not have been meretricious, so far as the appellee is concerned. There is evidence to show that she was deceived, but it was clearly illegal. The general rule is that a relation shown to have been illicit at its commencement * * * raises no presumption of marriage." Hunt's Appeal, 86 Pa. St. 294.

In the case in hand the relation between these parties was illicit at its commencement, and known to be such by the parties. There was no marriage in law or in fact. They were to have been married the next week, according to the appellant's own testimony. That it was prevented by the death of Mr. Grimm, if the fact be so, was a misfortune to the appellant. It would have been better for her had the cohabitation been later, or the marriage earlier. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

HANTZ v. SEALY.

6 Binney (Pa.) 405. (1814.)

Assumpsit by Mary Sealy against Jacob Hantz, administrator of Henry Sealy, deceased, plaintiff's late husband, to recover the amount of personal estate bequeathed to her in his will. The defendant set up, among other defenses, that the plaintiff was his wife. Henry Sealy died in 1798, and the plaintiff and defendant were married before a clergyman in 1799. They cohabited as man and wife and held themselves out as such and had children. At the time of their marriage, however, Hantz had another wife living, from whom he had been separated effectually according to his own notion, but with no effect in law. A legal divorce was obtained after the marriage with Mrs. Sealy, and cohabitation was continued as before. Subsequently Hantz and the plaintiff went to their counsel, a Mr. Watts, on some business and he advised them to celebrate a new marriage, and the transaction set forth in the opinion took place. The court below held that this did not constitute a legal marriage. The plaintiff had judgment in the trial court, which was reversed on other grounds, but sustained in so far as the question of the validity of the marriage was concerned.

TILGHMAN, C. J.: * * * The defendant pleaded that he was married to the plaintiff, on which issue was joined, and it was objected that the judge ought to have directed the jury that the evidence proved the marriage. The judge laid down the law correctly. He told the jury that marriage was a civil contract, which might be completed by any words in the present time without regard to form. He told them also, that in his opinion the words proved did not constitute a marriage, and

in this I agree with him. The plaintiff and defendant came to their lawyer, Mr. Watts, on business, without any intention of marrying. They had long lived in an adulterous intercourse, although they considered themselves as lawfully married. In fact they had entered into a marriage contract which was void, because the defendant had a former wife living, from whom he had been separated by consent but not legally. Some time before the parties came to Mr. Watts, a legal divorce had been pronounced, and Mr. Watts advised them to celebrate a new marriage. The defendant said, "I take you (the plaintiff) for my wife," and the plaintiff being told that if she would say the same thing the marriage would be complete, answered, "to be sure he is my husband good enough." Now these words of the woman do not constitute a present contract, but allude to the past contract, which she always asserted to be a lawful marriage. Mr. Watts advised them to repeat the marriage in a solemn manner before a clergyman, which was never done. So that under all circumstances, it appears to me, that what was done was too slight and too equivocal to establish a marriage. * * *

Judgment reversed.

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b. *Necessity for Cohabitation.*

BARNETT v. KIMMELL.

35 Pa. St. 13. (1859.)

Action by Emma Kimmell against Theodore Barnett and David Hamilton on a bond. Judgment for plaintiff. Reversed.

READ, J.: Theodore Barnett, a minor, with his uncle, David Hamilton, entered into a bond with warrant of attorney to Emma Kimmell, in the penal sum of six hundred dollars, conditioned for the payment of three hundred dollars within sixty days from the 9th of June, 1858, with stay of execution for that period, and on the 14th of June in the same year, judgment was entered upon it. At the same time, and of the same date with the bond, another paper was drawn up and executed by the obligee, and delivered to Hamilton, one of the obligors, in which, after reciting the giving of the bond, etc., it was provided that, if within sixty days, Barnett proposed to marry Miss Kimmell, and was rejected by her, or on the other hand, if his proposition was accepted, and he married her, then and from thenceforth the bond was to be null and void. On the

14th July, 1858, they were married in the presence of witnesses, at the house of Miss Kimmell's sister, where she resided, by the Rev. Mr. Babcock, a minister of the Methodist Episcopal Church. Upon a rule taken on the 13th June, 1859, on the plaintiff, to show cause why the judgment should not be marked satisfied, the court directed an issue to determine whether the conditions expressed had been complied with, which was tried, and under a strong charge from the presiding judge, the jury gave a verdict for the plaintiff. The fact of marriage was not denied, but it was alleged, that it was accompanied by such circumstances of fraud as to render it null and void; or, in other words, that the parties were not married at all. This is a startling proposition, and requires a careful examination, as it would give the courts the power, in an entirely collateral proceeding, to divorce man and wife.

Barnett, by the obligation, was bound to make the offer to marry. This was imposed upon him as a duty by the plaintiff, and one which she knew he was unwilling to perform. His connections were opposed to the match, and this was well known to the plaintiff, who provided for it, by securing the payment to her of three hundred dollars, in case he did not give her the opportunity, within a limited period, of accepting or rejecting him.

The plaintiff declined taking any smaller sum, and the defendant then proposed to marry her, to which she consented, and they were legally married by the ceremony of the Methodist Episcopal Church. Whatever was said by him immediately before the marriage is immaterial, as it was said to the plaintiff herself, who was fully aware of his feelings; and the loose declarations made three months after his marriage, that he would not live with her, or do anything for her, may be classed in the same category.

The only fact proved to invalidate the marriage was, that since it took place he has not lived with her. This clearly does not render it null and void ab initio, or a state of divorce would become the rule instead of the exception.

The act of the 8th May, 1854, empowers the courts of common pleas to grant divorces, where the alleged marriage was procured by fraud, force, or coercion, and has not been subsequently confirmed by the acts of the injured party. In the present case, there was clearly neither force nor coercion, and any fraud between man and wife should only be tried between those parties by the tribunal, and in the manner, pointed out by the act of assembly. Mrs. Barnett has never applied for a divorce, nor did she ever deny or repudiate the marriage, until

this question of fraud of intention was raised, on the trial of this issue, a year and more after the event itself. It is clear, that Theodore Barnett is a married man, and if he married another woman during the life of his present wife, he would be guilty of bigamy, and if Mrs. Barnett did a similar act, she would be guilty of a like offense. * * *

The conclusion, then, is, that these parties were legally married, and never having been divorced for any cause whatsoever, the stipulation in the paper, accompanying the bond, has been complied with; and, of course, that the judgment entered on it should have been marked satisfied. Such a result is absolutely necessary to protect the offspring, whether born before or after the marriage, from the stain and disabilities of illegitimacy. * * *

Judgment reversed, and a venire de novo awarded.

FRANKLIN v. FRANKLIN.

154 Mass. 515, 28 N. E. 681, 13 L. R. A. 843, 26 Am. St. 266. (1891.)

Libel by Hugh Franklin against Delia M. Franklin for a divorce on the ground of adultery. Libellant had had sexual intercourse with libellee before marriage with the result that she became pregnant. She instituted bastardy proceedings against him, and, being under arrest, he married her "to give the child a name," and have it born in wedlock, it being agreed that the parties should never live together as husband and wife. Immediately after the marriage the parties separated. Libel dismissed. Libellant alleged exceptions. Exceptions sustained.

KNOWLTON, J.: The libelant and libelee became husband and wife by virtue of a lawful marriage. The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage or its effect upon the status of the parties should be in any way affected by their preliminary or collateral agreements. Barnett v. Kimmell, 35 Pa. St. 13; Harrod v. Harrod, 1 Kay & J. 4, 16.

The consummation of a marriage by coition is not necessary to its validity. The status of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages. Eaton v. Eaton, 122 Mass. 276; Dies v. Winne, 7 Wend. (N. Y.) 47; Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 368; Patrick v. Patrick, 3 Phillim. Ecc. 496; Dalrymple v. Dalrymple, 2 Hagg. Const. 54. The libelant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and on the facts reported neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the statutes in relation to divorce. Lea v. Lea, 8 Allen (Mass.) 419; Thompson v. Thompson, 1 Swab. & T. 231; Cooper v. Cooper, 17 Mich. 205. Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that, in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce. Morrall v. Morrall, 6 Prob. Div. 98; Beeby v. Beeby, 1 Hagg. Const. 140, note; Mortimer v. Mortimer, 2 Hagg. Const. 310; J. G. v. H. G., 33 Md. 401; Anderson v. Anderson, 1 Edw. Ch. 380.

The court has jurisdiction, notwithstanding that the parties have never lived together as husband and wife within this commonwealth. The continuous residence of the libelant in the commonwealth for more than five years next preceding the filing of his libel brings the case within the exception stated in Pub. St. ch. 146, § 5. On the facts stated in the bill of exceptions the divorce should have been granted, and the entry must be, exceptions sustained.

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c. *Statutory Provisions.*

PARTON v. HERVEY.

1 Gray (Mass.) 119. (1854.)

Habeas corpus by Thomas J. Parton in behalf of Sarah E. Parton, alleged to be the lawful wife of the petitioner, and to be deprived of her liberty and unlawfully detained from petitioner's custody by respondent Susan Hervey, her mother.

Respondent claimed that the marriage between the petitioner and said Sarah was void because Sarah was only thirteen years old, and was of weak and disordered intellect and incapable of contracting marriage, and that the petitioner, without the respondent's consent (the father being dead) had clandestinely enticed Sarah from her mother's custody and caused the marriage to be solemnized. A hearing was had before Bigelow, J., who, after consultation with the other judges, drew up the following opinion:

BIGELOW, J.: At the hearing of this cause, I was entirely satisfied by the testimony, that the marriage of the petitioner with the daughter of the respondent was not procured or solemnized clandestinely, or through fraud and deceit practiced on the wife; but that she freely and willingly assented thereto, without undue influence or persuasion; that she was not of weak or impaired intellect, but of competent understanding, and of the ordinary degree of intelligence of persons of her age; and that the respondent had restrained her of her liberty against her will, and had prevented her by force from joining the petitioner and living with him as his wife.

Upon this state of facts, the only remaining question raised by the respondent is whether, under the laws of this commonwealth, a marriage by a female infant of the age of thirteen years is legal and valid, if had and solemnized with the free assent of such infant, but without the knowledge or consent of her parent and guardian. This presents an interesting question, nearly affecting the most important of the domestic relations, upon which, being anxious to arrive at a satisfactory result, I have taken the opinion of the other members of the court.

By the common law, both in England and in this country, the age of consent is fixed at twelve in females and fourteen in males. Contracts of marriage between infants, being both of the age of consent, if executed, are as binding as if made by adults. Co. Lit. 79 b. Reeve Dom. Rel. 236, 237. 20 Amer. Jurist, 275. 2 Kent Com. (6th ed.) 78. Pool v. Pratt, 1 Chip. Vt. 254. The Governor v. Rector, 10 Humph. (Tenn.) 61. This rule, originally engrafted into the common from the civil law, (1 Bl. Com. 436; Macph. on Inf. 168, 169,) is undoubtedly an exception to the general principles regulating the contracts of infants, and might, at first, seem to disregard the protection and restraint with which the law seeks to surround and guard the inexperience and imprudence of infancy. But in regulating the intercourse of the sexes by giving its highest sanctions to the contract of marriage, and rendering it, as far as possible,

inviolable, the law looks, beyond the welfare of the individual and a class, to the general interests of society; and seeks, in the exercise of a wise and sound policy, to chasten and refine this intercourse, and to guard against the manifold evils which would result from illicit cohabitation. With this view, in order to prevent fraudulent marriages, seduction and illegitimacy, the common law has fixed that period in life, when the sexual passions are usually first developed, as the one, when infants are deemed to be of the age of consent, and capable of entering into the contract of marriage.

It is urged, that this rule of law is not in force in this commonwealth, because, by our statutes, ministers of the gospel and magistrates have always been prohibited, under a heavy penalty, from solemnizing marriages of males under twenty-one years of age, or of females under eighteen years of age, without the consent of their parents or guardians. St. 7 Wm. 3, Rev. Sts. ch. 75, §§ 15, 19. St. 1853, ch. 335, § 1. The effect of these and similar statutes is not to render such marriages, when duly solemnized, void; although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages, when the prescribed conditions and formalities have not been fulfilled. In the absence of any provision, declaring marriages, not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute. 2 Kent Com. 90, 91. 2 Greenl. Ev. § 460. Milford v. Worcester, 7 Mass. 48. Londonderry v. Chester, 2 N. H. 268. Hantz v. Sealy, 6 Binn. (Pa.) 405. And such is the effect given to similar statutes in England. The King v. Birmingham, 8 B. & C. 29. Catterall v. Sweetman, 1 Robertson, 304. In the language of Parsons, C. J.: "When a justice or minister shall solemnize a marriage between parties, who may lawfully marry, although without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty for a breach of his duty." 7 Mass. 54, 55.

That the age of consent, as fixed by the common law, is the rule in force in this commonwealth, is strongly implied from Rev. Sts., ch. 76, § 2, by which it is enacted, that "a marriage, solemnized when either of the parties was under age of consent, if they shall separate during such nonage, and shall not cohabit together afterwards, shall be deemed void, without any

decree of divorce." There being no rule established by statute, fixing the age of consent, it is clear that the age of consent referred to in this section is that fixed by the common law. Such was manifestly the opinion of the learned commissioners, who revised the statutes of the commonwealth; and with a view to change the law in this particular, they reported a provision fixing the age of consent at seventeen in males and fourteen in females. Report of Commissioners on Rev. Stat., ch. 75, § 1, and note. This provision was stricken out by the legislature, thus affording strong proof that the rule of the common law was well understood, and required no change to adapt it to our condition and state of society.

Under these circumstances, we are all of opinion, that the marriage between these parties, both being of the age of consent, was valid and binding, although had and solemnized without the consent of the parent and guardian of the female; and there being sufficient proof of restraint of the wife by her mother, the respondent, the order must be, that she be discharged therefrom.

STATE v. BITTICK.

103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. 869. (1891.)

THOMAS, J.: The defendant was indicted and convicted in the Callaway Circuit Court for taking away Bertha A. L. Bice, a female under 18 years of age, from Sarah Rhine, her mother, who had the legal charge of her, for the purpose of concubinage, and was sentenced to imprisonment in the penitentiary for a term of two years. From this sentence he has taken his appeal to this court. The record shows that the defendant was a widower, with six children, and according to the finding of the jury Bertha A. L. Bice was under 18 years of age. She lived with her mother, who was a widow. The mother testified that the girl was about 16 years old. The girl worked at defendant's, and it seems fell in love with him, and she and he desired to marry, but, the mother refusing to give her consent, they were unable to obtain a marriage license.

Determined, however, not to be thwarted in their designs and wishes, they got together, and F. L. Minor testified as to what then occurred as follows: "Know Mrs. Rhine and Bertie Bittick, the wife of defendant. Bertie and defendant were married at my house about the 16th of last April. Were married

publicly, in the presence of over twenty persons. They married themselves. There was no minister or officer present. They stood up in the parlor floor, and mutually agreed and promised to marry each other. They publicly made known themselves as man and wife. Lived, cohabited, and held themselves out to the world as man and wife. They were known and recognized by the public as man and wife. They, at the time of said marriage, signed and executed a written marriage contract, which was attested by myself and a number of others." Witness identified the following contract as made by the parties, and witnessed by him and others: Marriage Contract. "We, Hiram J. Bittick and Bertie A. L. Bice, enter into a solemn vow to live together so long as we may both live, to live together as man and wife, in the presence of our God and the undersigned witnesses, at the residence of F. L. Minor, in Cote Sans Dessein Township, County of Callaway, State of Missouri, on this 16th day of April, 1890. H. J. Bittick. Bertha A. L. Bice. Witness: F. L. Minor. W. A. Johnson. Fannie A. Johnson. Jane T. Minor. Agnes Bittick. Olivia Riefstieck. Rose Riefstieck. William Riefstieck. Herbert Johnson. The above and foregoing instrument of writing was filed for record, April 29, 1890, at 10:20 a. m., and duly recorded. George W. Penn, Recorder. By P. B. Bailey, Deputy Recorder."

This is a sufficient statement of the facts of this case to present the points involved. Upon the facts thus given the court gave ten instructions at the instance of the state, and seventeen at the instance of defendant, and yet defendant complains that the court did not fully instruct the jury. The view we have taken of the case renders it unnecessary to refer to the instructions specifically.

Suffice to say that the court told the jury that the marriage ceremony and contract as given here did not constitute a marriage, and therefore that defendant could not escape the penalty of the statute under which he was indicted, on the ground that he had made Bertha his wife. The defendant contends that this was error, and that this ceremony and contract did constitute a valid marriage, and therefore that defendant and Bertha were, after April 16, 1890, man and wife, and had a right to cohabit together as such, and this is the point to be decided. Owing to the importance of the question, involving, as it does, the best interests of society and the preservation of the home and family, the basis of all good society, we gave it a very careful consideration. This and kindred questions have been before the American and English courts so often, and the subject has been so frequently and thoroughly discussed by the

courts and text-writers, that we deem it unnecessary, and even a profitless task, to review the authorities again in this case.

Ever since 1805 we have had statutes in this state regulating the marriage ceremony, and providing who might solemnize it. These statutes remained, in substance, the same till 1881, when for the first time an act requiring a license to marry was passed. Prior to this change the question as to whether the statutes of this state on the subject superseded the common law, and rendered a marriage not in conformity with the statutory requirements void, was before this court in 1857, in State v. McDonald, 25 Mo. 176; in 1876, in Cargile v. Wood, 63 Mo. 501; in 1877, in Dyer v. Brannock, 66 Mo. 391; and again in 1883, in State v. Gonce, 79 Mo. 600.

Two propositions are conclusively settled in this state by the cases above cited: (1) That prior to the adoption of the statute in 1881, requiring a marriage license before any one authorized by the statute could perform the ceremony, a marriage according to the common law was valid in this state, though not in conformity to the statute. (2) In the interpretation of statutes on the subject of marriage, a common-law marriage is good though not in conformity to the statutory requirements, unless the statutes contain express words of nullity. And we may add that this rule of interpretation has been adopted in nearly all the American states. See Stew. Mar. & Div., § 53, where the authorities are collated; and also 1 Bish. Mar. & Div. § 283; as well as the cases cited in Dyer v. Brannock, supra. These two propositions being settled even beyond debate, let us see if it was intended by the statute of 1881 to change or modify them, or either of them. The first section of this act (Sess. Acts 1881, p. 161) provides that, "previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same." The remaining provisions of the act are substantially as they had existed prior to its enactment, the changes made being such only as to make a statutory marriage conform to the theory of the license system. And the statute of 1881 was, in all essential particulars, in force in 1890, when defendant and Bertha were married, as they claim. By other sections of this act, the officer authorized to issue marriage licenses was prohibited from issuing a license authorizing the marriage of any male under 21 or female under the age of 18 years, except with the consent of his or her father, or, if he is dead, etc., his or her mother, etc., and imposing penalties upon those who issue licenses or solemnize the marriage ceremony contrary to the statutory requirements. But

there are no words in the act declaring a marriage not in conformity to the statute null and void. Hence, applying the rule of interpretation of marriage statutes given above, to the statute in force on April 16, 1890, we see that, if the marriage of defendant and Bertha was good at common law, it was not made null and void by the statute, and is therefore valid.

The only question remaining, therefore, for us to determine, is, did the contract in this case constitute a valid common-law marriage? We think it did. Our statute defines marriage thus: "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential." While it is here declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a status, created by contract, and we formulate the definition of it as follows: Marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex. The contract of marriage in this case comes up to every requirement of this definition. It created the relation of husband and wife between defendant and Bertha, so long as they both should live. In form, then, the contract was good, and constituted a valid marriage at common law. 1 Bish. Mar. & Div. §§ 2, 3. This relation between them is indissoluble, except by death or a decree of court. It is scarcely necessary for us to cite authorities that at common law a female of the age of 12 and a male of 14 were capable of entering into a contract of marriage. Id. § 145. There is no question that the parties in this instance were capable of assuming the marital relation by contract, at common law. The defendant having entered into a valid marriage with Bertha A. L. Bice, and thus made her his wife, he was not guilty of the crime of taking her away from her mother for the purpose of concubinage.

We will add that we have come to this conclusion very reluctantly, for we feel that the best interests of men and women, and children, of society, of the family, and the home require that parties should not "marry themselves," and all marriages should be entered into publicly before those authorized by law to solemnize them, and put upon the public records. But we are not here to make the law conform to what we think it ought to be, but to declare it as it is. As late as 1877, this court, after a full review of all the authorities, declared that a statute prescribing the formalities to be observed in the solemnization of

marriage did not render marriages entered into according to the common law, but not in conformity to such formalities, void, unless the statute itself declared them null, and that this rule of interpretation had been the rule since 1857; and yet, when the statute of 1881 was enacted, the words of nullity of all marriages not in conformity to the statute were omitted. If the law-making power had desired to make common-law marriages void, all that was required was to add to the first section of the act of 1881 these words, "and all marriages entered into without a license shall be void." This was not done, and hence we must conclusively presume that it was intended that that act should be interpreted by the rule then in force, as declared by this court. The legislature has the power to add these words at any time, but this court has no such authority. The judgment of the lower court is reversed, and defendant discharged.

All concur.

HAWKINS v. HAWKINS.

142 Ala. 571, 38 So. 640, 110 Am. St. 53. (1905.)

Suit by Milton Hawkins against Bella Hawkins to annul their marriage. Decree overruling motion to dismiss bill and demurrer to bill. Affirmed.

McCLELLAN, C. J.: Bill filed by Milton Hawkins against Bella Hawkins. Its averments present this case: Milton was under arrest and about to be tried preliminarily on the charge of having seduced Bella. He was innocent of the charge. He was young, a mere boy, and inexperienced. It was proposed to him to dismiss the prosecution and set him at liberty if he would marry the girl. He was advised by the magistrate before whom he had been brought, and his trial was to be had, that it would be best for him to do this. Thus environed and pressed and advised, he consented to marry. Thereupon a ceremony of marriage was performed between him and the girl by said magistrate. This ceremony was had under the supposed authorization of a paper in form a marriage license, but which had no legal status as such; having been in part issued by the magistrate himself, by filling in the names and date of

a license form which had been signed in blank by the judge of probate. There has never been any cohabitation of the parties as man and wife, nor sexual intercourse since, or even before, the ceremony. Leaving out of view the duress, this was no marriage. The formal apparent solemnization was without license, and hence inefficacious as a statutory marriage. And the formal consent to be man and wife was not consummated into that relation under the common law by cohabitation. Ashley v. State, 109 Ala. 48, 19 South. 917.

We are of opinion that the chancery court—of course, wholly without reference to its statutory jurisdiction to grant divorces—has power to declare the nullity of the performance as a marriage. Had there been a valid license, the jurisdiction of chancery to annul the marriage under it is undoubted; being, indeed, the general jurisdiction of that court to annul contracts into which the complaining party has been coerced to enter. So, too, this jurisdiction would exist to that end, had the complainant, moved thereto by the contract he had made under duress, consummated the agreement by cohabitation; assuming there was no statutory marriage. And though there was no license and has been no consummation, the contract of marriage—the undertaking to cohabit—is still extant, so to speak, and nominally subsisting and binding. The marriage might yet be consummated, and such consummation might well result from the moral or supposed legal constraint of the contract, which itself was the product of duress per minas.

Under these circumstances, the complainant, we think, is entitled to invoke the jurisdiction of chancery to annul contracts induced by duress, to a declaration of the nullity of this contract and of the consequent marriage, though only ceremonial. Without resting the jurisdiction at all upon that consideration, the fact that the license is regular and valid on its face, and the fact that a formal ceremony had been, with apparent authority, certified to the judge of probate, demonstrate the practical importance to the complainant of the relief he seeks. The jurisdiction attaching on the ground of duress, "the fitness and propriety of a judicial decision pronouncing the nullity of such a marriage [though no marriage in legal contemplation] is very apparent, and is equally conclusive to good order and decorum and to the peace and conscience of the party."

The bill has equity. It is not open to the objections taken by the demurrer. The decree of the city court overruling the motion to dismiss the bill for want of equity and the demurrer must be affirmed.

d. *Marriage of Persons Under Disability of Prior Marriage.*

SCHUCHART v. SCHUCHART.

61 Kans. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. 342. (1900.)

Action by Thomas Schuchart against Agnes Schuchart to recover possession of real estate claimed by defendant as the widow of Jacob Schuchart. Judgment for defendant. Affirmed.

JOHNSTON, J.: The controversy in this case arises over the title to a quarter section of land in Washington County, claimed by Thomas Schuchart as the son and only heir of Jacob Schuchart, who died in December, 1896, while the defendant claims the property on the ground that she was the lawful wife, and is now the widow, of Jacob Schuchart, deceased. The decision of the case turns on the point whether Agnes was the wife of Jacob at the death of the latter, and this question was determined in the affirmative by the jury in the trial court.

There is no dispute but that Jacob was married early in life to the mother of the plaintiff, but it appears that she died in 1891, leaving him free to contract the marriage relation with another. He undertook to enter into the marriage relation with Agnes, who, it appears, had been formerly married to one Porteous. There had been a separation between them, and she had not heard from or of Porteous for about seventeen years prior to the time she assumed the marriage relation with Schuchart. Lest he might be still alive, she procured a divorce from Porteous on September 10, 1894, in Riley County, where she then resided. Within three months thereafter, and before the decree of divorce became operative and final, she and Jacob Schuchart procured a license to marry, and a marriage ceremony in due form was performed by the probate judge of Washington County.

The parties overlooked or were unmindful of the statute providing that the marriage relation is not effectually dissolved until the expiration of six months from the date of the decree of divorce. The attempted marriage was, therefore, a nullity. But the contention of the defendant is that, having learned of the limitation of the statute, and of the invalidity of

the marriage ceremony, they then determined to live together as man and wife without further ceremony, and thereafter and in good faith did live for years in that relation. Was there a consensual or common-law marriage? The jury found that there was, and the proof abundantly sustains the finding. It shows that the marital relation was honestly, but illegally, assumed, in the first instance. Agnes was then under a disability, it is true, but, so far as the record shows, both of them were innocent of an intent to transgress the law or to commit a wrong. When they learned of the disability, and that it had been removed, the matter of another ceremony was considered and discussed between them. He expressed a willingness to have a repetition of the ceremony if she desired that it should be done, but stated that he saw no necessity for it. She did not think it was necessary, and both then declared that "we are man and wife, and will continue to be man and wife"; and it appears that thereafter they cohabited and otherwise lived together as such. They publicly acknowledged each other as husband and wife, assumed marriage rights, duties, and obligations, and have generally been reputed to be husband and wife in the community. The plaintiff even visited with and treated them as occupying the marriage relation, and so regarded them, until he heard of the statutory disability which existed when the marriage ceremony was performed.

The plaintiff contends that, as the relation between the parties in the first instance was illicit, the presumption is that the illicit relationship continued after the statutory disability had been removed. If they had entered into a mere meretricious relation, with an arrangement that the illicit cohabitation should be abandoned at the will of either, there would be room for a presumption that the illicit relationship continued after the removal of the disability. It is the policy of the law, however, to uphold marriage contracts, and to sustain marriage, where the parties in good faith intend to assume the marriage relation, and thereafter live together as husband and wife.

To establish the plaintiff's claim, he necessarily asserts the wrong of his father; that the connection was not formed with pure motives, nor entered into with the intention of creating the relation of husband and wife, but was merely formed for carnal commerce. As has been said, the law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Hynes v. McDermott, 91 N. Y. 451. Bishop, in treating of marriages formally entered into in good faith where there was an impediment to the marriage, says:

"If the parties desire marriage, and do what they can to render their union matrimonial, though one of them is under a disability,—as where there is a prior marriage undissolved,—their cohabitation, thus matrimonially meant, will, in matter of law, make them husband and wife from the moment when the disability is removed." 1 Bish. Mar. & Div. §§ 970, 975, 979; Teter v. Teter, 101 Ind. 129; Poole v. People (Colo. Sup.) 52 Pac. 1025.

The marriage in this case, as we have seen, was formally celebrated, and, as every presumption of the law is in favor of matrimony, the burden is on the plaintiff to show illegality, even though it may involve the proving of a negative. To establish his case, the plaintiff was, therefore, required to prove not only that Porteous was living, but that the marriage relation of the defendant with him had not been dissolved by divorce. He did show that Porteous was still living, but failed to show that a divorce had not been granted to Porteous from her. Boulden v. McIntire (Ind. Sup.) 21 N. E. 445; Klein v. Laudman, 29 Mo. 259; In re Rash's Estate (Mont.) 53 Pac. 312.

We need not rely on this presumption, however, and prefer to place our decision on the ground that there was a consensual marriage. Everything in the evidence indicates purity of purpose and good faith in forming the relation, and after the impediment was removed it is manifest that there was present in the minds of the parties that mutual consent which gives validity to marriages in cases where there is no formal solemnization. Some criticism is made upon the language employed by them to express their consent, but the surrounding circumstances and subsequent conduct of the parties leave no doubt as to the interpretation which should be placed upon their language. As held in Renfrow v. Renfrow, 60 Kans. 277, 56 Pac. 534, an express agreement between the parties to take and live with each other as husband and wife is not necessary. The agreement to do so may be implied from their acts and conduct in mutually recognizing and holding each other out as bound together in the matrimonial state. The words, however, that were used, and of which testimony was given, fairly indicate a present intention to marry, and to accept each other as husband and wife. This, in connection with their subsequent conduct, was clearly sufficient to establish marriage.

The objections to rulings upon testimony are unsubstantial, and what has been said is sufficient answer to the exceptions taken to the rulings upon instructions. The judgment will be affirmed.

All the justices concurring.

POOLE v. PEOPLE.

24 Colo. 510, 52 Pac. 1025, 65 Am. St. 245. (1898.)

Prosecution of C. H. Poole, under the Colorado statute, for wilful neglect to support his wife. Judgment of conviction. Affirmed.

GABBERT, J.: * * * It is contended that the evidence failed to establish the relationship of husband and wife between plaintiff in error and the prosecuting witness. It appears, conclusively, from a certified copy of the records, that the parties were married in due form, at Golden, in this state, the 26th day of August, 1881. At this time the prosecuting witness was a married woman, although she seems to have then believed she was divorced from her former husband. Plaintiff in error knew of her former marriage, but appears also to have believed that she had been divorced; so that, although the marriage contract of August 26, 1881, was a nullity on account of the incapacity of Mrs. Poole to enter into a valid marriage contract, both were innocent of any wilful intention to commit a wrong. March 31, 1882, the former husband procured a divorce from Mrs. Poole. The plaintiff in error admits that he knew of these proceedings; whether Mrs. Poole did is not altogether clear. After this knowledge on his part, with the exception of a very brief period, they continued to live together as husband and wife until some time in 1891. Since that date, they have sustained that relationship, at least a greater portion of the time, down to September 19, 1896.

If parties desire marriage, and do what they can to render their union matrimonial, but one of them is under a disability, their cohabitation thus matrimonially meant and continued after the disability is removed will, in law, make them husband and wife from the moment that such disability no longer exists. 1 Bish. Mar., Div. & Sep., §§ 970, 979. Or, as otherwise stated by this author: "To employ words more nicely accurate, and cover a larger ground, the living together of marriageable parties a single day as married, they meaning marriage, and the law requiring only mutual consent, makes them husband and wife." Id. § 975.

The facts in this case certainly bring the parties within the doctrine above announced. They attempted, in good faith, to enter into a legal marriage contract by procuring license and solemnization of marriage in the usual way. After the disabil-

ity of Mrs. Poole had been removed, they continued to live together as husband and wife; held each other out to the public as sustaining that relation; and although no subsequent marriage ceremony was performed, as is usual to evidence contracts of this character, they having originally assumed the marriage relation in good faith, in pursuance of what they believed to be a valid contract of marriage, and having continued that relationship for a long period after it could have been legally assumed, this raises the presumption that thereby they intended and meant marriage,—mutually assented to a contract of that character. * * *

There is no reversible error, and the judgment is affirmed. Affirmed.

ATLANTIC CITY RAILROAD CO v. GOODIN.

62 N. J. L. 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. 652. (1899.)

Action by Elizabeth Goodin, as administratrix of John H. Goodin, to recover for the wrongful killing of her intestate. Judgment for plaintiff. Affirmed.

COLLINS, J.: The writ of error in this cause removes a judgment for damages, recovered on verdict, under the death act. The chief complaint is that the trial judge refused to decide, as matter of law, that the decedent was guilty of negligence contributing to his death, but submitted the question of such negligence to the jury, as one of fact. * * * A careful reading of the whole testimony convinces me that, under the circumstances of this case, the question of contributory negligence was for the jury.

The only other errors assigned relate to the beneficial right of the plaintiff individually, in her suit as administratrix. Goodin left no child, or descendant of a child, and no parent. The plaintiff claimed, as widow, the entire benefit of the suit. P. L. 1897, p. 134. If she were not such, there could have been no recovery under the declaration as framed; and, while the proof showed that the deceased left a sister, the case was not tried on any theory that recovery could be had in her interest. The means of damages, of course, would have differed; and, as the judge, in his charge to the jury, put the matter of damages on the basis of a recovery by a widow, it is but fair to con-

sider proof of that status as vital. The judge, on the motion to nonsuit or direct a verdict, rightly refused to decide that there was no such proof.

There had been a ceremonious marriage between Goodin and the plaintiff many years before; but it was conceded that, soon afterwards, the plaintiff had learned that at the time of the marriage Goodin had a wife, from whom he was separated. Cohabitation was nevertheless continued, and the parties were reputed to be husband and wife. About 1892 the real wife died. Reliance is placed by the defendant upon the doctrine, declared in chancery and approved in this court, that where one of two persons, knowing of an existing bar to his or her marriage, perpetrates a fraud upon the other, by going through a marriage ceremony, such marriage is void, and that, although such bar be subsequently removed, cohabitation and reputation thereafter as husband and wife will not justify a presumption of marriage. Voorhees v. Voorhees' Ex'rs, 46 N. J. Eq. 411, 19 Atl. 172; Collins v. Voorhees, 47 N. J. Eq. 315, 555, 20 Atl. 676.

If the plaintiff's case had rested on presumption, it would have failed; but such was not the fact. It rested upon the proof of an actual marriage after the first wife's death. Some proof of reputation of marriage was, indeed, admitted under objection, and its admission is now assigned for error. Under the Voorhees case it was not evidential; but, as it was of no avail whatever to the plaintiff, it was immaterial, and harmless to the defendant. In the Voorhees case, Vice Chancellor Van Fleet concedes that a contract of marriage made per verba de præsenti amounts to an actual marriage, and is valid; and in the case of Stevens v. Stevens (N. J. Ch.), 38 Atl. 460, Vice Chancellor Pitney declares the law on the subject to the same effect, citing abundant authority. Dr. Bishop makes it quite plain that in this country, in the absence of prohibitive legislation, no more is required to constitute a legal marriage than that the man shall declare, in words of the present tense, that the woman is his wife, and that the woman shall assent. No witness need be present, and no particular ceremony is necessary. Bish. Mar., Div. & Sep., chaps. 14, 15, especially §§ 299, 313. The effect of a recent statute of this state is applicable only to nonresidents (P. L. 1897, p. 378), and need not now be considered. The plaintiff, by her own testimony, made a prima facie case of such a marriage contract, made directly after the first wife's death. True, no witness was present; but there was not the slightest reason to doubt the plaintiff's story, and every reason to believe it. It had corroboration in the testimony of a niece of the plaintiff, to whom Goodin had said,

in 1892 or 1893, after his first wife's death, "Your aunt now is my lawful wife." One of the exceptions assigned for error the refusal to strike out this admission of marriage, but it was clearly competent evidence. Bish. Mar., Div. & Sep. §§ 1057, 1058. The defendant called no witness, and in no way weakened the prima facie proof of such marriage. Of course, the jury might have disbelieved the testimony, and, doubtless, the judge, on request, would have submitted the fact of marriage to the jury, instead of assuming it as proved by undisputed testimony; but he was not asked to do so, and no exception was taken to the charge. The exception was to his refusal to charge that the "same proceeding" was necessary, "to make a common-law marriage, as was entered into before disability was removed." This seems to mean that a ceremonious marriage was requisite, and, of course, the judge properly refused the request.

I find no error in this judgment.

McGill, Ch., and Lippincott and Van Syckel, JJ., dissent.

THOMPSON v. THOMPSON.

114 Mass. 566. (1874.)

Suit by Harriet Thompson against Robert Thompson for the annulment of their marriage on the ground that at the time thereof he had another wife living. The defendant was married to one Ruth West in 1859. On February 19, 1867, she obtained a divorce from him on the ground of desertion, he being prohibited to marry again without leave of court. November 21, 1867, plaintiff and defendant went together to a lawyer's office in Boston where he, in her presence, signed and made oath to a petition for leave to marry again. She knew of the former marriage and divorce and also understood the purpose of the petition. That evening they were married by a duly qualified minister of the gospel. The decree authorizing him to marry again was not obtained, however, until February 18, 1868. From November 28, 1867, up to the time of this decree they cohabited as husband and wife, and also from the date of the decree until about January 1, 1873, she being under the belief that their original marriage was or had become valid, and both of them supposing that by the force of the decree and their subsequent cohabitation they had become lawfully husband and wife. Two children, still living, were born

thereupon brought this suit. The trial judge decreed that the this commonwealth, it must be solemnized between parties of the marriage after February 18, 1868. About January 1, 1873, the plaintiff was advised that her marriage was void and marriage was void and the defendant appealed. Affirmed.

GRAY, C. J.: To constitute a valid marriage by the law of competent to contract it, and (except in the case of Quakers) before a person being or professing to be a justice of the peace or minister of the gospel. Milford v. Worcester, 7 Mass. 48. Gen. Stat., ch. 106, §§ 14-20.

At the time of the ceremony of marriage between these parties, the husband was incapable of contracting marriage in this commonwealth, because he had been divorced, for his fault, from a former wife (who must be inferred from this report to have been still living), and had not obtained from the court leave to marry again. Gen. Stat., ch. 107, § 25. The solemnization of the second marriage, therefore, gave it no validity, and the cohabitation between the parties was unlawful at its beginning, and could only become lawful upon a new solemnization of matrimony after the husband had obtained leave to marry again.

The case, as stated in the report, shows that such new solemnization was not proved to the satisfaction of the presiding judge as matter of fact, and does not require it to be presumed as matter of law. Northfield v. Plymouth, 20 Vt. 582. The mere belief of either or both parties that they were husband and wife does not constitute a legal marriage. White v. White, 105 Mass. 325, 7 Am. Rep. 526. A decree of nullity must, therefore, be entered as prayed for. Glass v. Glass, 114 Mass. 563. Decree of nullity.

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5. CONFLICT OF LAWS.

a. Marriages Valid Where Celebrated.

(1.) *In General.*

SUTTON v. WARREN.

10 Metc. (Mass.) 451. (1845.)

Assumpsit by Samuel Sutton against Thomas B. Warren on a promissory note given by defendant to Ann Sutton, plaintiff's wife. Plaintiff and wife were natives of England, where they

were married November 28, 1834. About one year after their marriage they came to this country, where they ever since lived as husband and wife. Ann was the sister of Samuel Sutton's mother, that is, she was the aunt of her husband.

Judgment for plaintiff if the court were of opinion that he was entitled to recover; otherwise he was to be nonsuit. Judgment for plaintiff.

HUBBARD, J.: It is a well settled principle in our law, that marriages celebrated in other states or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this commonwealth, although the same might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life. Greenwood v. Curtis, 6 Mass. 378; Medway v. Needham, 16 Mass. 157; West Cambridge v. Lexington, 1 Pick. (Mass.) 506; Compton v. Bearcroft, Bul. N. P. 114; Scrimshire v. Scrimshire and Middleton v. Janverin, 2 Haggard, 395, 437. There is an exception, however, to this principle, in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters; and the exceptions rest on the ground, that such marriages are against the laws of God, are immoral, and destructive of the purity and happiness of domestic life. But I am not aware that these exceptions, by any general consent among writers upon natural law, have been extended further, or embraced other cases prohibited by the Levitical law. This subject has been carefully discussed by Chancellor Kent, in the case of Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; and while he is clear as to the exceptions before stated, he thinks, beyond them there is a diversity of opinion among commentators. 2 Kent. Com. Lect. 26. See also Story's Conflict of Laws, §§ 113, 114. There is also a provision in our statutes, making marriages void in this state, where persons resident in the state, whose marriage, if solemnized here would be void, in order to evade our law, and with the intention of returning to reside here again, go into another state or country and there have their marriage solemnized. Rev. Stat., ch. 75, § 6. The only object of this provision is, as stated by the commissioners in their report, to enforce the observance of our own laws upon our own citizens, and not to suffer them to violate

regulations founded in a just regard to good morals and sound policy. As to the wisdom of this provision it is unnecessary here to speak. But the provision is noted, to show that it has not been overlooked in the consideration of the case at bar, which presents no such state of facts.

In view of the whole matter, considering it as a part of the jus gentium, we do not feel called upon to extend the exceptions further. By our statutes, the marriage contracted between Samuel Sutton, the plaintiff, and Ann Hills, his mother's sister, if celebrated in this state, would have been absolutely void. But by the law of England, this marriage, at the time it was contracted, viz., in November, 1834, was voidable only, and could not be avoided until a sentence of nullity should be obtained in the spiritual court, in a suit instituted for that purpose. See Poynter on Marriage and Divorce, 86, 120; 2 Stephen's Com. 280. In The Queen v. Inhabitants of Wye, 7 Adolph. & Ellis, 771, and 3 Nev. & P. 13, the court of Kings Bench affirmed the doctrine, and held such marriage voidable only, and that, till avoided, it was valid for all civil purposes. Rosc. Crim. Ev. (2d ed) 286. Since this marriage was contracted, the St. of 6 Wm. 4, ch. 54, has been passed, making such marriages which should afterwards be celebrated absolutely void.

In the present case, the marriage of these parties was not void by the laws of England, though voidable in the spiritual court. It never was avoided, and though absolutely prohibited by our laws, yet not being within the exception, as against natural law, we do not feel warranted in saying the parties are not husband and wife. The plaintiff, Samuel Sutton, sues on a promissory note given to the said Ann Sutton, and, as her husband, he can maintain an action thereon, in his own name alone, there being no other cause of objection raised than the one stated in regard to the legality of their marriage. Bayley on Bills (2d Amer. ed.), 42; Clancy, Husb. & Wife, 4.

Judgment for the plaintiff.

WHITTINGTON v. McCASKILL.

65 Fla. 162, 61 So. 236. (1913.)

Action of ejectment by Josephine Whittington against R. E. L. McCaskill. Judgment for defendant. Affirmed.

SHACKLEFORD, C. J.: The plaintiff in error brought an action of ejectment against the defendant in error for the re-

covery of the possession of a lot in the city of Pensacola, which resulted in a verdict and judgment in favor of the defendant. It developed at the trial, either from the evidence adduced or from the agreed statement of facts, that Elizabeth Anderson, who was the daughter of the plaintiff, and who had one-eighth or more of negro blood in her veins, departed this life intestate, without any descendants surviving her, seised and possessed of the lot in question; that after acquiring the title to such lot Elizabeth Anderson removed from Pensacola, Fla., to Leavenworth, Kan., where she married W. J. Grooms, a white person, with whom she lived there for about six years and died there; that after her death the husband, W. J. Grooms, as her only heir at law, conveyed such lot to the defendant. After all the evidence had been submitted, the trial court directed the jury to find a verdict for the defendant.

We shall assume that the plaintiff, as the mother of Elizabeth Anderson, deceased, was shown by the evidence to have been entitled to maintain this action, though the record is by no means clear as to this. See section 2295 of the General Statutes of 1906, and Stone v. Citizens' State Bank, 64 Fla. 456, 59 South. 945. We shall further assume, though the record does not show that proof thereof was made, that such a marriage as the one in question is valid in the state of Kansas. We assume these matters, for the reason that no question is raised thereon, and they seem to be admitted by the respective counsel. As we understand it, the sole point presented for our determination, as it will be decisive of the case, is as to whether or not the marriage between Elizabeth Anderson and W. J. Grooms in the state of Kansas, where such marriages are recognized as valid, will be held invalid in this state, so as to prevent Grooms from inheriting as the sole heir at law of Elizabeth Anderson, deceased, the lot of which she died seised and possessed. In support of her contention, plaintiff in error relies upon section 24 of article 16 of the Constitution of 1885, which is as follows:

"All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited."

Sections 2579 and 3529 of the General Statutes of 1906, which are as follows, are also relied upon:

"2579. (2063.) Marriages between white and negro persons.—It shall be unlawful for any white male person residing or being in this state to intermarry with any negro female per-

son; and it shall be in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance."

"3529. (2606.) Intermarriage of white and negro persons. —If any white man shall intermarry with a negro, mulatto or any person who has one-eighth of negro blood in her, or if any white woman shall intermarry with a negro, mulatto or any person who has one-eighth of negro blood in him, either or both parties to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars."

We are of the opinion that this quoted section of the Constitution and the two quoted statutes fail to support this contention. To hold otherwise we would have to read something therein that is not there. Neither Grooms nor Elizabeth Anderson resided or was in this state at the time of their marriage; nor did they reside therein subsequent thereto. Neither does it appear that she removed from Florida for the purpose of contracting such marriage, or with the intent to evade our statute. We see no useful purpose to be accomplished by citing and discussing authorities from other jurisdictions, a number of which will be found collected in the note to In re Chace, on page 1054 of 3 Ann. Cas. There would seem to be some conflict in the authorities, but we shall not undertake to analyze them, or to point out the statutes upon which they are founded. Since the marriage was valid in the state of Kansas, where it was consummated and where the parties continued to reside until the death of the wife, we are of the opinion that neither our Constitution nor the statutes, referred to above, have any applicability thereto. Section 18 of our Declaration of Rights expressly provides: "Foreigners shall have the same rights as to the ownership, inheritance and disposition of property in this state as citizens of the state."

Our statute of descent (§ 2295 of the General Statutes of 1906), also referred to above, provides that "if there be no children or their decedents, and the decedent be a married woman and her husband survive her, all the property, real and personal, shall go to the husband." It follows that the judgment must be affirmed.

JACKSON v. JACKSON.

82 Md. 17, 33 Atl. 317, 34 L. R. A. 773. (1895.)

Proceedings to administer the estate of Richard W. Jackson, who died intestate. Sarah Jackson, daughter of decedent, plaintiff, and Elihu Jackson and others, brothers and sisters of decedent, defendants. The main question was the legitimacy of the plaintiff as turning upon the validity of the marriage of her parents, which took place in Pennsylvania without a religious ceremony as required to render marriages in Maryland valid. At the time of the alleged marriage the parties were domiciled in Pennsylvania, but afterwards moved to Maryland where they cohabited as husband and wife, though there was some conflict in the evidence as to the character of the woman and the nature of the cohabitation. The parties separated in 1874 and never again cohabited. Jackson died in 1893. Decision in favor of plaintiff's legitimacy. Affirmed.

McSHERRY, J.: This case is now before us for the second time. The first appeal is reported in 80 Md. 176, 30 Atl. 752. The legal principles applicable to the controversy were then laid down, and, upon a reversal of the judgment, the cause was remanded for a new trial. A new trial was had, resulting in the same verdict and judgment that were recorded on the first trial, and the same parties have again appealed who were the appellants on the former occasion. There was but a single issue involved, and that was whether the appellee is the legitimate daughter of Richard Watson Jackson, who died intestate some years ago. In passing on this issue, two juries in different counties have found by their verdicts that she is. * * *

The alleged marriage of the appellee's mother and father, if it took place, as has been twice found by separate juries, took place in the state of Pennsylvania. The evidence relied on to establish this marriage was general reputation, cohabitation, and acknowledgment. The admissibility and sufficiency of such evidence to prove a marriage was fully considered on the former appeal, and we need not repeat here what was so recently decided there. There was no effort to prove as a distinct fact that the marriage had been performed with any religious ceremony. * * *

Assuming there was no religious ceremony proved, or attempted to be proved, as there was not, it has been insisted with great zeal and earnestness that, even if the marriage found

by the verdict of the jury to have been contracted and consummated in Pennsylvania were valid by the laws of that state, yet the legitimacy of the appellee, who was born in Pennsylvania, where her parents then lived, must be determined, not by the laws of that state, but by the laws of Maryland; and that if, therefore, the marriage were, by reason of the failure to show there had been some religious ceremony, one that would not, on that account, have been valid under the statutes of Maryland, the issue of such a marriage would in Maryland be illegitimate, even though the marriage of which that issue was the fruit were conceded to be perfectly valid in the state where it was contracted and consummated, and the case of Doe v. Vardill, 5 Barn. & C. 438, was much pressed upon us to support that view.

But that case, and others founded on the same settled principle, are clearly distinguishable from the case at bar. It is a maxim as old as the common law that "hæres legitimus est quem nuptiæ demonstrant." A marriage, if valid where solemnized, is, in general, valid everywhere, and, of necessity, the offspring of that marriage would be treated as legitimate, wherever the marriage itself would be regarded as valid. But a local statute which makes an illegitimate child, or a child born out of wedlock, legitimate upon certain prescribed conditions, such as the subsequent marriage of the parents, and the recognition of the child as theirs, can have no extraterritorial operation, and therefore can not give to such child in another jurisdiction an inheritable status not accorded to it by the law of the latter jurisdiction. By the law of England, a child born out of wedlock was a bastard. By the law of Scotland, the subsequent marriage of the father and the mother, and their recognition of the child as theirs, legitimated the child. But that statute could not operate upon real estate in England, where the law gave to such a marriage no effect as legitimating prior-born children. The same principle was decided in Barnum v. Barnum, 42 Md. 251, and Smith v. Derr, 34 Pa. St. 126.

We have said that in general a marriage valid where performed is valid everywhere. To this broad rule there are, however, exceptions. "These exceptions or modifications of the general rule may be classified as follows—First, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; second, marriages which the local law-making power has declared shall not be allowed any validity. * * * To the first class belong those which involve polygamy and incest; and in the sense in which the term 'incest' is used are embraced only such marriages as are in-

cestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters. The second class, i. e., those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes—First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of 'valid where performed, valid everywhere.' To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society." Pennegar v. State, 87 Tenn. 244, 10 S. W. 305; s. c., with copious notes, 2 L. R. A. 703; State v. Tutty, 41 Fed. 753; Brook v. Brook, 9 H. L. Cas. 193; Commonwealth v. Graham (Mass.), 31 N. E. 706.

It is obvious, then, as there is no statute in Maryland declaring that a marriage of whose existence there is no other proof than general reputation shall be void, and as, at most, the statutory provisions relative to the methods of solemnizing marriages in Maryland relate to form and ceremony only, the courts of this state will recognize the Pennsylvania marriage as valid, if that marriage is valid by and under the laws of the latter commonwealth, and does not contravene the declared policy of our own positive law. We are not to be understood as speaking of marriages tolerated elsewhere, but denounced by our own positive state policy as affecting the morals or good order of society. Such marriages, however regarded elsewhere, would not be treated as valid here. For instance, the statutes of Maryland peremptorily forbid the marriage of a white person and a negro, and declare all such marriages forever void. It is therefore the declared policy of this state to prohibit such marriages. Though these marriages may be valid elsewhere, they will be absolutely void here, so long as the statutory inhibition remains unchanged.

But the question before us does not belong to such a category. At most, all that is asserted against the validity of the alleged marriage of the appellee's parents has reference to form

or ceremony, and these, as we have seen, do not cause a marriage to fall within any of the exceptions to the general rule that a marriage valid where performed is valid everywhere. * * *

Judgment affirmed, with costs above and below.

UNITED STATES v. RODGERS.

United States District Court, Eastern District of Pennsylvania. 109 Fed. 886. (1901.)

Suit by the United States, upon the relation of one Devine, against the defendant Rodgers, as commissioner of immigration, upon the question of deporting certain persons as aliens.

J. B. McPHERSON, D. J.: The relator is a naturalized citizen of the United States, and is the husband of Rosa Devine, and the father of her idiot son, William. Rosa and William are Russian Jews, whom the commissioner of immigration at the port of Philadelphia has ordered to be deported, on the ground that both are aliens, and that William is an idiot, and Rosa is a pauper that is likely to become a public charge. The alienage of both is denied upon the ground that when the husband and father became a citizen the wife and child ceased to be aliens; and this is the only point to be decided. The decision is admitted to depend upon the answer to be given to the question whether Rosa is the relator's lawful wife, or, rather, whether she is to be so regarded in this state; for she is her husband's niece, and such a marriage, if originally celebrated in Pennsylvania, would be void: Act 1860, § 39 (P. L. 393); 1 Purd. Dig. (Ed. 1872) p. 54. Among the Jews in Russia, however, where the ceremony took place, it has been satisfactorily proved that a marriage between uncle and niece is lawful, and, being valid there, the general rule undoubtedly is that such a marriage would be regarded everywhere as valid. But there is this exception, at least, to the rule: If the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this state to recognize the foreign marriage as valid. I think the following quotation from Dr. Reinhold Schmid, a Swiss jurist of eminence, to be found in Whart. Confl. Laws (2d Ed.) § 175, correctly states the proper rule upon the subject:

"When persons married abroad take up their residence with us, it is agreed on all sides that the marriage, so far as its for-

mal requisites are concerned, can not be impeached, if it corresponds either with the laws of the place where the married pair had their domicile, or with those where the marriage was celebrated. But we must not construe this as implying that the juridical validity of the marriage depends absolutely on the laws of the place under whose dominion it was constituted; for the fact that a marriage was void by the laws of a prior domicile is no reason why we should declare it void if it united all the requisites of a lawful marriage as they are imposed by our laws. So far as concerns the material conditions of the contract of marriage, we must distinguish between such hindrances as would have impeded marriage, but can not dissolve it when already concluded, and such as would actually dissolve a marriage if celebrated in the face of them. A matrimonial relation that in the last sense is prohibited by our laws can not be tolerated in our territory, though it was entered into by foreigners before they visited us. We will, therefore, tolerate no polygamous or incestuous unions of foreigners settling within our limits."

Other authority may be found in State v. Brown, 47 Ohio St. 102, 23 N. E. 747, where it is said, in determining the effect of a statute that forbade sexual intercourse between persons nearer of kin than cousins:

"We hold, therefore, that by section 7019 Rev. St., sexual commerce as between persons nearer of kin than cousins is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated where it was valid, for we are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based upon principles of sound public policy, because they have assumed, in another state or country, where it was lawful, the relation which led to the acts prohibited by our laws."

See, also, Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 8 Am. Dec. 131, and In re Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539.

In view of this exception to the general rule, it seems to me to be impossible to recognize this marriage as valid in Pennsylvania, since a continuance of the relation here would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary. In other words, this court would be declaring the relation lawful, while the court of quarter sessions of Philadelphia county would be obliged to declare it unlawful. Whatever may be the

standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public. A review of the Pennsylvania legislation affecting the marriage of uncle and niece will be found in Parker's Appeal, 44 Pa. 309. It is accordingly ordered that Rosa and William Devine be remanded.

STATE v. BELL.

7 Baxter (Tenn.) 9, 32 Am. Rep. 549. (1872.)

Indictment of J. P. Bell, a white man, for living with a negro woman as his wife. The parties were married in Mississippi, being domiciled in that state at the time of the marriage. Subsequently they removed to Tennessee and continued in that state to cohabit as man and wife. Miscegenation was lawful in Mississippi but prohibited by statute in Tennessee. Upon motion, the indictment was quashed in the court below, and the state appealed. Reversed.

TURNEY, J.: The motion of the defendant to quash was allowed because it appeared upon the face of the indictment the parties were married in the state of Mississippi.

The question to be determined is, does a marriage in Mississippi protect persons who live together in this state in violation of the act of the general assembly of the 27th of June, 1870?

For the defendant, the case of Morgan v. McGhee, 5 Humph. (Tenn.) 13, is relied on. That case only decides that marriages solemnized according to the law and usages of the country where made are good in Tennessee. It is the manner and form of marriage, and not the capacity of the parties to contract the marriage, which was passed upon by the court delivering the opinion. The reason for such rule is readily seen. Each state has its peculiar regulation—some more, some less strict and formal. The general rule resulting from all—that a marriage good in the place where made after the forms and usages of that place, shall be good everywhere—is intended to prevent a mischief that would otherwise grow out of a difference of for-

mal and local regulations. For instance, in some of the states a license is not absolutely necessary. Now, if in one of such states a marriage is solemnized without license, being good there, it is good in Tennessee, where a license is necessary, and where a marriage and living together without license would subject the parties to indictment for lewdness.

A respect for and recognition by each state—in fact, nation—of the legal ceremonial of marriage in another, is all that is meant or intended by the rule. All standard authors declare the rule comes, not ex comitate, but ex debito justitiæ. Were it otherwise, each state would be dependent upon the concurring legislation and adjudication of every other for the permanency and efficacy of its own.

Each state is sovereign, a government within, of, and for itself, with the inherent and reserved right to declare and maintain its own political economy for the good of its citizens, and can not be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or existed in a state having no prohibition against it or even permitting it.

Extending the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a state or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Chancellor Kent says the contract of marriage is a stable and sound contract, of natural as well as municipal law. This is neither.

Reverse the judgment and remand the cause for a new trial.

STATE v. ROSS.

76 N. Car. 242, 22 Am. Rep. 678. (1877.)

Indictment of Pink Ross, a negro man, and Sarah Ross, a white woman, for fornication and adultery, in cohabiting without being lawfully married. The defendants were married in

South Carolina according to the laws of that state, in May, 1873. Pink Ross was a native, and at the time of the marriage a domiciled citizen, of South Carolina. Immediately before the marriage the defendant Sarah, (then Sarah Spake), who up to the time of the marriage was domiciled in North Carolina, went to South Carolina for the purpose of marrying the other defendant, intending to evade the law of North Carolina against miscegenation. The parties cohabited in South Carolina until August, 1873, when they moved to North Carolina. Miscegenation was lawful in South Carolina but prohibited in North Carolina. Defendants were held not guilty and the state appealed. Affirmed.

RODMAN, J.: [After stating the facts as above.] It will be observed that the verdict states that Sarah went to South Carolina with the intent to evade the law of North Carolina prohibiting the marriage of a negro with a white person. It does not say that she had an intent to return with her husband and live in this state. It is difficult to see how, in going to South Carolina to marry a negro, without an intent to return with him to that state, she could evade or intend to evade the laws of this state. Our laws have no extra-territorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that state. Such a case differs essentially from one in which both persons, being domiciled in North Carolina, leave the state for the purpose of contracting a marriage forbidden by its law, and with an intent to return to and reside in North Carolina after such marriage; and also from one in which the man alone leaves this state for that purpose and with that intent.

By the marriage of Sarah, the domicile of her husband became hers. And we must suppose that his domicile was bona fide in South Carolina until they removed to this state in August, 1873.

It does not appear that any change of domicile was thought of before that time. We must put out of view, therefore, the supposed intent to evade the law of North Carolina, as a conclusion of law unsupported by or repugnant to the facts found in the verdict, and consider the case as if both parties had been domiciled in South Carolina at the time of the marriage. It is clear that upon the marriage the domicile of the husband became that of the wife, and for that purpose it would be immaterial whether the marriage took place in the state of the husband or in any other state. * * *

The question thus presented is an important one. The state of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy as tending to degrade them both. It has, therefore, declared such marriages void. It is needless to say that the members of this court share that opinion. For that reason it becomes us to be careful not to be unduly influenced by it in ascertaining, not what the law of North Carolina is upon such marriages contracted within her limits—that is found in the act of assembly and is beyond doubt—but what the law of North Carolina is upon the question presented, and for that we must look beyond the statutes of the state.

If we are right in our conception of the question presented, to wit: whether a marriage in South Carolina between a black man and a white woman bona fide domiciled there and valid by the law of that state, must be regarded as valid in this state when the parties afterward migrate here? We think that the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here.

[Here the court, after citing some authorities, states the general rule and the exceptions thereto that marriages valid where celebrated are valid everywhere, and continues:]

On examining the illustrations of these exceptions given by the author, [Story, Confl. of Laws, § 113], it will be seen that they are considerably limited. Thus all Christian countries agree that marriages in the direct line and between the nearest collaterals are incestuous, and that polygamy is unlawful, consequently such marriages will be held null everywhere, because they were null in the place of the contract. But beyond these few cases in which all states agree, there is a difference as to what marriages are incestuous, and in such cases the admitted international law leaves it to each state to say what is incestuous in respect to its own subjects. In England, a marriage with the sister of a deceased wife is held incestuous, and between persons domiciled in England it will be held void wherever contracted. Brook v. Brook, 9 H. L. Cas. 193. But it does not follow that such a marriage contracted in a state where it was lawful, between subjects of that state, would be held void in England if the parties afterward became domiciled there. There is no reason to think it would be. Story, §§ 116, 116a. Still stronger are the illustrations given in §§ 95, 96.

However revolting to us and to all persons who, by reason

of living in states where the two races are nearly equal in numbers, have an experience of the consequences of matrimonial connections between them, such a marriage may appear, such can not be said to be the common sentiment of the civilized and Christian world. When Massachusetts held such a number of negroes as to make the validity of such marriages a question of practical importance, her sentiment and her legislation were such as ours are today. Medway v. Needham, 16 Mass. 157. Now since she has got rid of her negroes the question is of no practical importance to her. And as far as may be gathered from her statute book she considers such marriages unobjectionable. Most of the states of the Union and of the nations of Europe with whom the question is merely speculative take a similar view of it.

It is impossible to identify this case with that of an incestuous or polygamous marriage admitted to be such jure gentium. The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister states. We are compelled to say that this marriage being valid in the state where the parties were bona fide domiciled at the time of the contract must be regarded as subsisting after their immigration here.

The inconveniences which may arise from this view of the law are less than those which result from a different one. The children of such a marriage, if born in South Carolina, could migrate here and would be considered legitimate. The only evil which could be avoided by a contrary conclusion is that the people of this state might be spared the bad example of an unnatural and immoral but lawful cohabitation. The inconveniences on the other side are numerous, and are forcibly stated in Scrimshire v. Scrimshire, 2 Hagg. Consist. Rep. 417, and in Story, § 121. "And, therefore, all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the law of the country where they are celebrated."

Upon this question above all others it is desirable (altering somewhat the language of Cicero with which Story concludes his great work) that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.

There is no error in the judgment below. Let this opinion be certified.

Judgment affirmed.

READE, J., delivered a dissenting opinion.

(2) Marriages in Evasion of Law of Domicile.

COMMONWEALTH v. GRAHAM.

157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. 255. (1892.)

Prosecution of one Theodore G. Graham under a statute for nonsupport of his wife. The defendant and his wife, being citizens of Massachusetts, went to Maine for the purpose of evading the law of Massachusetts requiring the written consent of a minor's father to his marriage, and were married in Maine, the defendant, at the time being only 19 years old. His father never consented to the marriage, and upon his return to Massachusetts claimed and took defendant's wages, the defendant and his wife living for a few days after the marriage at his father's home. At the time of the complaint the defendant allowed him a part of his wages. Neither defendant nor his wife had any property. The defendant excepted to the rulings of the court as to instructions refused and given, the court instructing that the marriage was valid, and that the defendant had a right to such portion of his wages as would enable him to support his wife, and that the father could claim only the rest, the effect of which was that defendant could not claim his duty to his father as a defense. Exceptions overruled.

FIELD, C. J.: The exceptions recite that the "defendant was nineteen at the time of his marriage, and twenty when the complaint was made." The age of the wife nowhere appears, but it was not contended that she was under the age of consent. If the marriage had been solemnized within the commonwealth, it would have been valid. Pub. St. ch. 145, § 6; Parton v. Hervey, 1 Gray, 119. It is not contended that the marriage was void by the laws of Maine, but we can not take judicial notice of the statutes of Maine; and the common law of that state must be presumed, in the absence of evidence, to be the same as the common law of Massachusetts. See Hiram v. Pierce, 45 Maine 367. Section 10, ch. 145, Pub. St., was intended to define the cases in which a marriage should be deemed void which was solemnized in another state by persons resident in this commonwealth, who went into the other state for the purpose of having the marriage solemnized there, and afterwards returned to and resided in this commonwealth; but the present case is not within this section. The general rule of

law is that marriage contracted elsewhere, if valid where it is contracted, is held valid here, although the parties intended to evade our laws, unless the statutes declare such a marriage void, or the marriage is one deemed "contrary to the law of nature, as generally recognized in Christian countries." Com. v. Lane, 113 Mass. 458; Sutton v. Warren, 10 Metc. (Mass.) 451; Com. v. Hunt, 4 Cush. 49. The consequences of this marriage must be the same as if it had been solemnized in this commonwealth; and the presiding justice, therefore, correctly ruled that this marriage "imposed upon the defendant all the duties and responsibilities of the marital relation."

The real question is whether, when a minor son marries without the consent of his father, and the father never consents to it, and needs the son's wages for his support and the support of his family, the father is entitled to the son's wages during minority in preference to the wife, who also needs the wages for her support. The ruling was that the "wife would be entitled as of right to receive support from" her husband, and that he "would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest." It seems to be settled that the marriage of a minor son, with the consent of his father, works an emancipation; and it is not clear that the marriage of a minor son without his father's consent does not have the same effect, although the decision in White v. Henry, 24 Maine 531, is contra. It has been said that "the husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be master of himself, his time, his labor, earnings, and conduct." Sherburne v. Hartland, 37 Vt. 528. There seems to be little doubt that, when an infant daughter marries, she is emancipated from the control of her parents. Aldrich v. Bennett, 63 N. H. 415; Burr v. Wilson, 18 Tex. 307; Porch v. Fries, 18 N. J. Eq. 204; Rex v. Wilmington, 5 Barn. & Ald. 525; Rex v. Everton, 1 East. 526; Northfield v. Brookfield, 50 Vt. 62. See, however, Babin v. Le Blanc, 12 La. Ann. 367. The meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings. In Taunton v. Plymouth, 15 Mass. 204, it was intimated that the marriage of an infant son with the consent of the father entitled the son to his own earnings for the support of his family; and in Davis v. Caldwell, 12 Cush. (Mass.) 512, it was said that an infant husband is liable for necessaries furnished for himself and his

family. It is clear, we think, that it is the duty of an infant husband to support his wife, and that, if he have property and a guardian, it is the duty of the guardian to apply the income, and, so far as is necessary, the principal, of his ward's property, to the maintenance of the ward and his family, under Pub. St. ch. 139, § 30. We are of opinion that these considerations make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent, and that the ruling of the court was sufficiently favorable to the defendant. Whether sound policy does not require that in every case in which the marriage is valid an infant husband should be entitled to all his earnings need not now be decided.

Exceptions overruled.

LEVY v. DOWNING.

213 Mass. 334, 100 N. E. 638. (1913.)

Petition by Abraham Levy against Evelyn Downing for a decree of nullity of marriage. Both parties were citizens of Massachusetts, and being less than 18 years of age, went to New Hampshire with intent to evade the law of Massachusetts as to the marriage of minors, and were married in New Hampshire, immediately returning to Massachusetts to live, never, however, cohabiting as husband and wife. Petition dismissed for want of jurisdiction.

HAMMOND, J.: "That a marriage valid by the laws of the place where it is celebrated is valid in this state, on grounds of public policy, though the parties went into another state merely to avoid the laws of the state, is established in the cases of Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131, West Cambridge v. Lexington, 1 Pick. 506 [11 Am. Dec. 231], Putnam v. Putnam, 8 Pick. (Mass.) 433, and Sutton v. Warren, 10 Metc. (Mass.) 451." Drury, J., in Commonwealth v. Hunt, 4 Cush. 49. See, also, Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509, and cases therein cited for a general discussion of the subject. By statutes in this commonwealth certain cases have been freed from the operation of this rule, and in those specified cases the marriage is void in this

commonwealth, "if the parties, both being resident here and intending to return and reside here," go into a foreign state in order to evade the provisions of our statute, "and there have the marriage solemnized, and return and reside here." R. L. ch. 151, §§ 1-5, both inclusive, and § 10. The present case does not come within these statutes, and therefore is governed by the general law.

The question of the validity of the marriage must be decided by the law of New Hampshire. In the absence of proof to the contrary the common law of that state must be regarded as the same as in this state. The only statute of that state material to this inquiry is St. 1907, ch. 80, § 2, which is as follows: "The age of consent shall be in the male eighteen years and in the female sixteen years. Any marriage contracted below the age of consent," with certain exceptions not here material, "may in the discretion of the superior court be canceled at the suit of the party who at the time of contracting such marriage was below the age of consent unless such party after arriving at such age shall have confirmed the marriage." Under that law this marriage was solemnized, and by that law must the question of its validity be determined. It is plain that under it the marriage is not void, but must stand until and unless the superior court of that state in the exercise of its discretion sees fit to annul it. The superior court of this state rightly held that it had not the power to grant to the petitioners the relief prayed for.

Petition dismissed without prejudice.

JOHNSON v. JOHNSON.

57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179. (1910.)

Action for divorce by Nannie W. Johnson against Amel Johnson. Judgment for defendant. Reversed.

RUDKIN, C. J.: This is an appeal from a judgment denying a divorce to the appellant and dismissing her action. The case is brought here on the findings of fact, conclusions of law, and decree. The only findings we deem it necessary to set forth or consider are the following: "That plaintiff and defendant were married at Victoria, B. C., May 2, A. D. 1905, and ever since have been and now are husband and wife. That at the time of said marriage the parties hereto were domiciled in the

city of Seattle, County of King, State of Washington, and that to avoid the law of this state prohibiting said marriage they went to Victoria, B. C., and were married there, immediately returning to the said city of Seattle, where they have ever since made their domicile. That plaintiff and defendant are first cousins of the whole blood, the mother of plaintiff and the mother of defendant being sisters of the whole blood." There was no appearance by the defendant in the court below, and no brief has been filed in this court by him or in his behalf, but from such investigation as we have been able to give the subject we are at a loss to know upon what ground or for what reason the divorce was denied. Section 4468, Ballinger's Ann. Codes & St. (Pierce's Code, § 1791), declares that: "Marriages in the following cases are prohibited: * * * (2) When the parties thereto are nearer of kin to each other than second cousins, whether of the whole or half-blood, computing by the rules of the civil law; (3) * * * and if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year." "A marriage between relations within the prohibited degrees is void, its continuance is repugnant to good morals and public policy, and it will be annulled at the instance of either party, notwithstanding the applicant entered into it knowingly and wilfully." 26 Cyc. 907.

In considering the validity of a marriage contracted in violation of a similar statutory prohibition, In re Wilbur's Estate, 8 Wash. 35, 35 Pac. 407, 40 Am. St. 886, this court said: "The general rule is that the lex loci contractus is controlling in adjudications involving the validity of marriages, * * * though this doctrine has an important exception, which is involved in the case before us. Appellant claims that inasmuch as at the time of the alleged marriage there was in this territory a statute prohibiting a marriage betwen a white person and an Indian (Acts 1866, p. 81), even considering the reservation as a foreign jurisdiction, the marriage was void, because Wilbur thereby committed a fraud upon the law of his domicile, which was the territory. Where a marriage is prohibited either by the statute or by those rules of morality and decency which make it against the natural law of civilized nations for two persons to marry, as incestuous or polygamous marriages, it is in vain for them to go beyond their domicile to engage in a contract of marriage for the purpose of avoiding the prohibition.

Their contract will be held void upon their return." See also, State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800. Marriages between parties so nearly related are prohibited in nearly all civilized countries, and, if argument in support of such a policy is needed, the fact that the only offspring of this marriage is deaf and dumb supplies it.

The marriage being void, it was the duty of the trial court to declare it so, and the judgment is reversed, with directions to annul the marriage and for further proceedings not inconsistent with this opinion.

STATE v. KENNEDY.

76 N. Car. 251, 22 Am. Rep. 683. (1877.)

Indictment of Isaac Kennedy, a negro man, and Mag Kennedy, a white woman, for fornication and adultery, in cohabiting without being lawfully married. Both defendants were citizens of North Carolina, and went to South Carolina for the purpose of evading the law of North Carolina and were married in South Carolina according to the law of that state, and immediately returned to North Carolina. Verdict of guilty. Judgment affirmed.

RODMAN, J.: The defendants in this case were domiciled in North Carolina before and at the time of their marriage in South Carolina, to which state they went for the purpose of evading the law of North Carolina, which prohibited their marriage, and they, immediately after the marriage, returned to North Carolina, where they have since continued to reside.

To quote from the opinion of Lord Cranworth in Brook v. Brook, 9 H. L. 193: "There can be no doubt of the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry; and the consequences of their marrying."

It is not necessary to say that a marriage contracted in another state between residents of this state, without the rites and ceremonies required in this state, will be void, even though the parties left this state for the purpose of evading those rights. Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 54.

As to the formalities of the marriage the lex loci will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void,

this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the state with the intent to evade its law or not, if they had not bona fide acquired a domicile elsewhere at the time of the marriage. Story's Confl. of Laws, § 65; Williams v. Oates, 3 Ired. (N. C.) 535. In Brook v. Brook, above cited, Lord Campbell says: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile, as contrary to religion, or to morality, or to any of its fundamental institutions." In that case an Englishman casually met in Denmark the sister of his deceased wife and married her there. As such marriages were prohibited between English subjects, it was held void.

A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line.

There are cases to the contrary of this conclusion decided by courts for which we have great respect. They are cited and the whole question is learnedly and earnestly discussed by 1 Bishop on Mar. and Div., §§ 371, 389; Medway v. Needham, 16 Mass. 157; Stevenson v. Gray, 17 B. Monr. (Ky.) 193.

It seems to us, however, that when it is conceded as it is, that a state may, by legislation, extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries, by whose law no such incapacities exist, as Massachusetts did after the decision in Medway v. Needham, the main question is conceded, and what remains is of little importance. Nothing remains but the question of legislative intent to be collected from the statute. About the intent in this case we have no doubt.

There is no error. Let this opinion be certified.

Judgment affirmed.

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3. MARRIAGE OF DIVORCED PERSONS PROHIBITED TO MARRY.

STATE v. SHATTUCK.

69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. St. 936. (1897.)

Prosecution for adultery. The defendant, Addie Shattuck, having been convicted, alleged exceptions. Exceptions overruled.

ROWELL, J.: The charge is that the prisoner, an unmarried woman, committed adultery with Coburn, a married man. It appeared that Coburn's first wife, who is still living, obtained a divorce from him in this state in December, 1895; that on June 13, 1896, he and Grace Hoisington, both of whom were then domiciled in Windsor, in this state, went to Claremont, N. H., and were there married by a clergyman authorized by the law of that state to solemnize marriages; and that immediately after the marriage they returned to Windsor, where they have lived ever since, and where they first cohabited as husband and wife, never having cohabited as such in New Hampshire.

The only evidence of the law of New Hampshire respecting marriages was chapter 174 of the Public Statutes of that state, entitled "Marriages." That chapter imposes no restraint upon remarriage by the guilty party to a decree of divorce. The court charged the jury that if it found that the marriage ceremony was performed by the clergyman, and that he was authorized to perform it, as his testimony tended to show, and also found that the said Grace cohabited with Coburn under the belief that the marriage was legal, as her testimony tended to show, the marriage was valid, and Coburn was a person with whom the crime of adultery could have been committed. To this the prisoner excepted, and also for that the court did not charge that there was no evidence in the case to show that Coburn, being disqualified by the laws of this state to contract a lawful marriage, was, notwithstanding such disqualification, competent by the laws of New Hampshire to contract a lawful marriage, and that without such testimony the fact of his marriage to said Grace was not made out. This last exception is not sustainable. As we have said, the chapter of the New Hampshire statutes put in evidence is not restrictive in this behalf; and if it be said that some other part of the statutes may be, the answer is that, as such restrictions upon marriage are exceptional, the burden was on the prisoner to show the restriction, if any there is. Hutchins v. Kimmell, 31 Mich. 126, 132. And, as no such restriction exists in the common law of this state, the presumption is that the common law of New Hampshire is like ours in this regard. Ward v. Morrison, 25 Vt. 593, 601. The marriage in question must, therefore, be taken to be valid by the law of New Hampshire. But, had it been celebrated in this state, it would be void here, for our statute provides that it shall not be lawful for a divorced libelee to marry a person other than the libelant for three years from the time the divorce is granted, unless the libelant dies; and

imposes a penalty on a person who violates that provision, or lives in this state under a marriage relation forbidden by it; and we have recently held that a marriage celebrated in this state in violation thereof, between parties domiciled here, was void here. Ovitt v. Smith, 68 Vt. 35, 33 Atl. 769.

The prisoner claims that this marriage is void here notwithstanding it was celebrated in New Hampshire, and is valid there, for that, when a marriage is absolutely prohibited in a state or country as being contrary to public policy, and leading to social evils, the domiciled inhabitants of that state or country can not be permitted, by passing the frontier, and entering another state, in which the marriage is not prohibited, to celebrate a marriage forbidden in their own state, and immediately return to their own state, to insist on their marriage being recognized as lawful.

It is the common law of Christendom that as to form and ceremony a marriage good where celebrated is good everywhere. But as to capacity to marry the authorities are not agreed, some holding that, as in other contracts, it depends upon the law of domicile, and some that it depends upon the law of the place where the marriage is solemnized, as do form and ceremony, and that a marriage good where celebrated is good everywhere, unless odious by the common consent of nations, or positively prohibited by the public laws of a country from motives of policy.

It is undoubtedly true that states may control this matter by statute, as Massachusetts does, where it is enacted that when persons resident in that state, in order to evade its marriage laws, and with an intention of returning to reside there, go into another state or country, and are married, and afterwards return and reside in Massachusetts, the marriage shall be deemed void. We have no such express provision. The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. To bind even citizens abroad, it must include them, either in express terms or by necessary implication. Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist. If they are valid by the international law of marriage and the local law

of the place where celebrated, they are valid by the law of such state, and the statute has nothing to do with the question if such international law is a part of the law of the state, as it is here, for a written law not construed to be extraterritorial does not change the unwritten law as to extraterritorial marriages; and therefore parties who are under no disability by international law may choose their place of marriage, and, if the marriage is valid there, it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have made them married. There is, therefore, no foundation for an argument based simply on the idea of an evasion of the law of domicile.

This doctrine is entirely applicable to statutes prohibiting marriage after divorce. Such statutes are not extraterritorial, unless made so by express words or necessary implication, as has been frequently held in this country, though there are cases the other way, among which is the recent and well-considered case of Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, where the cases adopting the same view will be found. But the weight of American authority, as well as reason and analogy, sustain the proposition stated. This whole subject is very fully and satisfactorily discussed by Mr. Bishop in chapter 39 of the first volume of his work on Marriage, Divorce and Separation; and, as we adopt his views, an extended discussion here is not necessary. The subject is also fully discussed in Commonwealth v. Lane, 113 Mass. 458, and Ross v. Ross, 129 Mass. 243. In the latter case it is said that, the relation of husband and wife being based upon the contract of the parties, and recognized by all Christian nations, the validity of the contract, if not polygamous nor incestuous according to the general opinion of Christendom, is governed, even as regards the capacity of the parties, by the law of the place of marriage; that this status, once legally created, should be recognized everywhere as fully as if created by the law of the domicile; and that, therefore, such a marriage, if valid by the law of the place where contracted, even if contracted between persons domiciled in Massachusetts, and incompetent to marry there, is valid there to all intents and effects, civil and criminal, except so far as the legislature has clearly declared that such a marriage out of the commonwealth shall be deemed invalid.

The same doctrine is held in Van Voorhis v. Brintnall, 86 N. Y. 18, where it is said that, in the absence of express words to that effect, it is not to be inferred that the legislature intended its enactments to contravene the jus gentium under which the question of the validity of the marriage contract is

referred to the lex loci contractus, and which is made binding by the consent of all nations, and professedly and directly operates upon all; and that, while every country can regulate the status of its own citizens, until the will of the state finds clear and unmistakable expression to the contrary, that law must control. Judge Marshall says in United States v. Fisher, 2 Cranch (U. S.) 389, that, "where rights are infringed, where fundamental principles are overturned, where the general system of the law is departed from, the legislative intent must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

Brook v. Brook, 9 H. L. Cas. 193, sustains the prisoner's contention. There a man and his deceased wife's sister, both of whom were lawfully domiciled British subjects, went temporarily to Denmark, and were there married, where their marriage was valid; but it was held void in England, because an English statute prohibited such marriages. The law lords delivered separate opinions, and the only ground upon which they agreed was that, as the statute made such marriages between English subjects domiciled in England void because declared by the act to be contrary to the law of God, it must be construed to include such marriages though solemnized abroad. Judge Gray says, in Commonwealth v. Lane, above cited, that the judgment in that case proceeds upon the ground that an act of parliament is not merely an ordinance of man, but a conclusive declaration of the law of God, and that the result is that the law of God, as declared by act of parliament, and expounded by the house of lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure. Mr. Bishop criticises the case very sharply, and says it is of the highest importance that it be sufficiently understood in this country to avoid any accident of its being followed by our courts. He discusses it very fully, admitting that it was difficult for him to write soberly about it, as the decision was announced in apparent oblivion of the course that justice had taken for ages in England, and ignored alike acts of parliament and judicial decisions. To follow it, he says, would lead us into confusion not to be endured where marriage, good order, and Christian decency are respected.

The French law is much like the English in this regard, though more exacting. By the Code Napoleon, a marriage contracted in a foreign country between French people, or between a French person and an alien, is valid if it has been celebrated

in the manner followed in such country, provided it has been preceded by the publication required by the Code, and provided the French person has not violated the provisions of the Code concerning the qualifications and conditions required to contract marriage. Cachard's French Civ. Code, art. 170. This accords with the further provision of the Code that laws relating to the status and capacity of persons apply to Frenchmen even residents in a foreign country. Id. art. 3. On this principle the civilians generally, we think, hold that as to capacity to marry the law of the domicile governs. But the other view, as suggested by Judge Story, is founded upon a more liberal basis of international policy that deems it far better to support as valid marriages celebrated in another state or country when in conformity with the laws thereof, although some minor inconveniences may arise therefrom, than to shake general confidence in such marriages, to subject the innocent issue to constant doubts as to their legitimacy, and to leave the parties themselves at liberty to cut adrift from their solemn obligations whenever they happen to become dissatisfied with their lot. Story, Confl. Laws, pl. 124.

Judgment that there is no error in the proceedings of the county court, and that the prisoner take nothing by her exceptions.

STATE v. FENN.

47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800. (1907.)

Prosecution of Elizabeth Fenn for bigamy. Demurrer to information sustained. Appeal by state. Reversed.

RUDKIN, J.: An information was filed against the defendant in the court below accusing her of the crime of bigamy. A demurrer to the information was sustained, and, the state refusing to plead further, judgment of dismissal was entered, from which the present appeal is prosecuted.

The information is in the usual form in such cases, and charges a crime, unless it contains matter which, if true, would constitute a defense to the action. The matter set forth in the information and relied on as a defense is this: The respondent was lawfully divorced from one Edward Hodges, her then husband, by the Superior Court of King County in this state in the month of February, 1901. Within 10 days after obtaining such divorce she married one Joseph Clark in Victoria, B. C., and continued to cohabit with him until the month of January, 1907,

such marriage being valid according to the laws of British Columbia, where contracted. The alleged bigamous marriage was contracted in Pierce County in this state on the 16th day of January, 1907, with one Arthur Fenn. If the Victoria marriage was valid in this state, the information charges a crime; but, if invalid, the respondent had no husband living at the time of the Fenn marriage, and the judgment should be affirmed.

The question thus presented calls for a construction of § 1 of the act of March 9, 1893, Laws 1893, p. 225, ch. 94, which reads as follows: "Section 1. Whenever a judgment or decree of divorce from the bonds of matrimony is granted by the courts in this state, neither party thereto shall be capable of contracting marriage with a third person until the period in which an appeal may be taken has expired; and in case an appeal is taken then neither party shall intermarry with a third person until the cause has been fully determined; and it shall be unlawful for any divorced person to intermarry with any third person within six months from the date of the entry of the judgment or decree granting the divorce, or in case an appeal is taken it shall be unlawful to contract such marriage until judgment be rendered on said appeal in the Supreme Court. All marriages contracted in violation of the provisions of this section, whether contracted within or without this state, shall be void."

In support of its appeal, the state relies upon the two general propositions: That a marriage valid where contracted is valid everywhere, and that statutes declaring a second marriage unlawful, pending the time for appeal from divorce proceedings and imposing a penalty for their violation, are penal in their nature, and have no extraterritorial effect. The general doctrine that a marriage valid where contracted is valid everywhere has so often been declared by the courts and reiterated by text-writers that it has become a maxim of the law. But there are exceptions to the rule as well established as the rule itself, viz., (1) incestuous and polygamous marriages prohibited by natural law; and (2) marriages prohibited by positive law.

The Victoria marriage now under consideration may fall within the second exception. Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923; Putnam v. Putnam, 8 Pick. (Mass.) 433; People v. Chase, 28 Hun (N. Y.) 310; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Thorpe v. Thorpe, 90 N. Y. 602, 43 Am. Rep. 189, and other cases cited by the appellant, to the effect that statutes declaring in general terms that certain marriages contracted in violation of their

provisions shall be void and have no extraterritorial effect, have no application here. The decisions were also based on the general language of the acts under consideration; the courts holding that it did not appear that the respective legislatures intended that the acts should apply to marriages contracted without the state.

The statute of this state, however, admits of no such construction. It declares in direct and positive terms that all marriages contracted in violation of its provisions, "whether contracted within or without this state shall be void." The power of the state to declare void marriages contracted beyond its borders, at least where such marriages are contracted by its own citizens in violation of its laws, can not be denied. Thus in Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690, a negro man and a white woman domiciled in Virginia went to the District of Columbia, and were there regularly married. About ten days thereafter they returned to Virginia, and were prosecuted for lewd and lascivious cohabitation. The Court of Appeals of that state ruled that the marriage in the District of Columbia was a mere evasion of the laws of the commonwealth prohibiting such marriages, and could not be pleaded in bar of the prosecution, though the marriage was confessedly valid in the District of Columbia, where contracted. In Williams v. Oates, 27 N. C. 535, it was held that a marriage contracted in South Carolina by a citizen of North Carolina, in violation of the statute of North Carolina, forbidding the guilty party to a divorce proceeding to marry again, was void in North Carolina, though valid in South Carolina where contracted. To the same effect see Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. 648.

In State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683, it was held that a marriage between a negro man and a white woman domiciled in North Carolina, but contracted in South Carolina, in violation of the laws of North Carolina, was void in North Carolina, though valid in South Carolina. On the other hand, the same court held in State v. Ross, 76 N. Car. 242, 22 Am. Rep. 678, that a marriage contracted between a negro and white person in South Carolina where lawful, both parties being domiciled there, was valid in North Carolina. In State v. Tutty (C. C.) 41 Fed. 753, 7 L. R. A. 50, it was held that a marriage between a white person and a negro domiciled in Georgia is utterly void under the Georgia statute, though valid in the District of Columbia, where contracted. In Brook v. Brook, 9 H. L. Cas. 193, it was held that the marriage of Britsh subjects in Denmark is invalid in England, if prohibited by British law,

though the marriage was valid according to the laws of Denmark.

It will thus be seen that a state law regulating marriage may and does have an extraterritorial effect when the legislature so intends, at least where the parties to the marriage have their domicile within the state; and there is no escape from the conclusion that our legislature intended that all marriages contracted within the state, and all marriages contracted without the state by persons domiciled here, for the purpose of evading our laws, should be null and void. The statute is undoubtedly broad enough to include all marriages contracted within the time specified, regardless of the place where contracted and regardless of the domicile of the parties; but we do not think that such was the legislative intent. If the statute should be construed to avoid marriages contracted in other states by citizens of other states who never owed allegiance to our laws, it is the most drastic piece of legislation to be found on the statute books of any of our states. As we have shown, the general rule is that the validity of a marriage is determined by reference to the law of the place where contracted. An exception to the general rule is sometimes made in favor of the law of the domicile of the parties. But a statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.

We are satisfied that the prohibition in question was directed solely against marriages within the state, or by persons domiciled within the state, but contracted in other states, for the purpose of evading our laws, and that no other persons or marriages are included or contemplated. Within the above rule the information before us does not contain matter which constitutes a defense, for it does not appear that the Victoria marriage was void. If the parties to the Victoria marriage had their domicile in this state at the time the marriage was contracted, and went to Victoria for the purpose of evading our laws and thereafter returning to this state, such marriage was null and void, and, much as we regret it, the prosecution must fail. If, on the other hand, the parties to the Victoria marriage were domiciled there at the time the marriage was contracted, such marriage does not fall within the prohibition of our statute, and is valid.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

LANHAM v. LANHAM.

136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. 1085. (1908.)

Application by Sarah A. Lanham for an allowance for her support out of the estate of James W. Lanham, deceased, on the ground that she was his widow. Both parties were citizens of Wisconsin. On September 15, 1905, she obtained a judgment of divorce from one J. R. Sherman for the purpose of marrying Mr. Lanham, who was then 84 years old. By the statute of Wisconsin the parties to a divorce are prohibited from marrying again within one year after the decree. For the purpose of evading this law, the parties went to Michigan and were there married October 10, 1905. They immediately returned to Wisconsin and cohabited as husband and wife until Mr. Lanham's death, March 13, 1907. On March 8, 1907, the plaintiff applied to the county judge for a permit to marry Mr. Lanham, but he was then very ill and no ceremony was ever performed. The county court held that there was no valid marriage and refused the allowance. This judgment was reversed by the circuit court and the allowance granted, and from this judgment Lanham's heirs appealed. Reversed.

WINSLOW, C. J. (after stating the facts): Section 2330, St. 1898, as amended by ch. 456, p. 785, Laws of 1905, provides, among other things, that, "it shall not be lawful for any person divorced from the bonds of matrimony by any court of this state to marry again within one year from the date of the entry of such judgment or decree and the marriage of any divorced person solemnized within one year from the date of the entry of any such judgment or decree of divorce shall be null and void." A proviso to the section authorizes the circuit judge to grant permission to the divorced parties to remarry within the year, but this is of no moment here. The first question is whether the Michigan marriage was valid, notwithstanding the provisions of this law.

The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere. To this rule, however, there are two general exceptions, which are equally well recognized, namely: (1) Marriages which are deemed contrary to the law of nature as generally recognized by Christian civilized states; and (2) marriages which the lawmaking power of the forum has declared shall not be allowed validity on grounds of public policy. An exhaustive review of the many and somewhat conflicting authorities upon this general subject

will be found in a note to Hills v. State in 57 L. R. A., at p. 155; s. c. 61 Nebr. 589, 85 N. W. 836. The first of these exceptions covers polygamous and incestuous marriages, and has no application here; and the question presented is whether the case comes within the second exception.

A state undoubtedly has the power to declare what marriages between its own citizens shall not be recognized as valid in its courts, and it also has the power to declare that marriages between its own citizens contrary to its established public policy shall have no validity in its courts, even though they be celebrated in other states, under whose laws they would ordinarily be valid. In this sense, at least, it has power to give extra-territorial effect to its laws. The intention to give such effect must, however, be quite clear. So the question must be, in the present case, whether our legislature by the act quoted declared a public policy, and clearly indicated the intention that the law was to apply to its citizens wherever they may be at the time of their marriage. To our minds there can be no doubt that the law was intended to express a public policy. There have been many laws in other states providing that the guilty party in a divorce action shall not remarry for a term of years, or for life, and these laws have generally been regarded merely as intended to regulate the conduct of the divorced party within the state, and not as intended to follow him to another jurisdiction and prevent a marriage which would be lawful there; in other words, they impose a penalty local only in its effect. Under this construction the remarriage of such guilty party in another state has generally been held valid, notwithstanding the prohibition of the local statute. Of this class are the cases of Frame v. Thormann, 102 Wis. 654, 79 N. W. 39, Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505, and State v. Shattuck, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. St. 936, and others which might be cited.

It is very clear, however, that the statute under consideration is in no sense a penal law. It imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained, except upon the ground that the legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages. The inference is unmistakable that the legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce, while at times necessary, should not be made easy, nor should inducement be held out to pro-

cure it; that one of the frequent causes of marital disagreement and divorce actions is the desire on the part of one of the parties to marry another; that if there be liberty to immediately remarry an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that nuion under the forms of law for the purpose of experimenting with another partner, and perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy, or it means nothing. It means that the legislature regarded frequent and easy divorce as against good morals, and that it proposed, not to punish the guilty party, but to remove an inducement to frequent divorce.

To say that the legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify its terms, is to make the act essentially useless and impotent, and ascribe practical imbecility to the lawmaking power. A construction which produces such an effect should not be given it, unless the terms of the act make it necessary. The prohibitory terms are broad and sweeping; they declare, not only that it shall be unlawful for divorced persons to marry again within the year, but that any such marriage shall be null and void. There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state, whether they be within or outside of its boundaries.

Such being, in our opinion, the evident and clearly expressed intent of the legislature, we hold that when persons domiciled in this state, and who are subject to the provisions of the law, leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state, and return to their domicile, such pretended marriage is within the provisions of the law, and will not be recognized by the courts of this state. Further than this we are not required to go. This view is sustained by the following cases: Brook v. Brook, 9 H. L. Cases, 193; Sussex Peerage Case, 11 Clark & F. 85; State v. Tutty (C. C.) 41 Fed. 753, 7 L. R. A. 50; Pennegar

v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. 648; McLennan v. McLennan, 31 Ore. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. 835; Estate of Stull, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 542, 63 Am. St. 776; Kruger v. Kruger (Super. Ct. Ill.) 36 Nat. Corp. Rep. 442.

Another view of the question, leading to the same result, has been suggested to our minds, which will be stated. The statute cited is an integral part of the divorce law of this state, and in legal effect enters into every judgment of divorce. This being so, must not any judgment of divorce be construed as containing an inhibition upon the parties, rendering them incapable of legal marriage within a year, which must be given "full faith and credit" in all other states, under § 1, art. 4, of the Constitution of the United States? And if it be entitled to receive such faith and credit, how can a marriage within another state be considered valid anywhere? Are not the parties incapable of contracting such a marriage anywhere, for the reason that they have not yet been relieved of their incapacity to marry another, resulting from their former marriage, or, in other words, for the reason that their divorce is not complete until the expiration of the year? We suggest these questions, without definitely expressing an opinion upon them or making them a ground of decision.

The Michigan marriage being held void, the question recurs whether the finding that there was a common-law marriage, resulting from the fact that the parties lived and cohabited together as man and wife for about six months, can be sustained This must be answered in the negative. This court has held that, where cohabitation is illegal in its inception, the relation between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing either directly or circumstantially the fact of an actual contract of marriage after the bar has been removed. Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722; Spencer v. Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848; Thompson v. Nims, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847. There was no such evidence here. At most the evidence only shows that the parties continued to live together after the expiration of the year in the manner of husband and wife, and talked about a remarriage, which never took place on account of the husband's illness and death. The evidence in fact rebuts any inference of remarriage, rather than supports it.

Judgment reversed, and action remanded to the circuit court, with directions to affirm the judgment of the county court.

Siebecker, J., dissents.

b. *Marriages Void Where Celebrated.*

CANALE v. PEOPLE.

177 Ill. 219, 52 N. E. 310.

Prosecution of Carmelo Canale for bigamy. Defendant was first married in 1891 in Italy to Rosalie LoCascio, the parties being then, respectively, 15 and 13 years of age. The parties cohabited in Italy for several months, when the defendant abandoned the woman and came to America, and was married, in 1897, in Chicago, to one Giuseppa Rimagro. The prosecution was for this second marriage. It was shown that by the Italian law the marriage in Italy was void because of the infancy of the parties and the failure to observe the requirements as to the marriage of infants such as consent of parents, etc. The defendant was convicted and judgment was entered on the verdict. Reversed.

CARTER, C. J. (after stating the facts): The vital question presented for our determination in this case is, was the alleged first marriage of plaintiff in error in Italy absolutely void? Counsel for the people contend that "the proof of a marriage in fact in another state, followed by cohabitation, is sufficient proof of the validity of the marriage, without evidence as to the law of the place where the marriage was celebrated"; citing numerous authorities.

It may be conceded that it is the general rule that, if the celebration of the marriage is proved by witnesses who were present, it is not necessary that any preliminary steps required by law should also be shown, as it will be presumed that the officiating person performed his duty, and proceeded only when his authority was complete. 1 Bish. Mar. & Div. § 450. Still, when there is direct and positive proof as to the invalidity of the marriage, this presumption can not prevail. The only proof offered by the people in respect to the alleged first marriage was that it was solemnized in a church by the officiating clergyman according to the rites of such church, and it was shown that no other ceremony was performed.

In the absence of proof as to the law of the kingdom of Italy relating to marriage, such proof would be sufficient to establish the marriage. But in this case we are confronted with a number of provisions of the Civil Code of Italy requiring that the contracting parties be of a certain age, or else the consent of the parents; notice to be posted by a certain official, which

could not be done without the consent of the parents duly obtained; and then a celebration in the town hall in a public manner before a certain civil official,—none of which provisions are shown to have been complied with. To this must be added the testimony of the Italian consul, who qualified as one learned in the Italian law, and testified, without objection, to the effect that a compliance with all these provisions was absolutely essential to a valid marriage in Italy, and that there was no other legal mode in which a marriage could be celebrated or contracted to make it valid in that kingdom, and that by no subsequent acts could it be ratified or validated, it being wholly null and void.

It is urged by counsel for the people that, notwithstanding the failure to observe such provisions, the marriage is still valid unless the law of the state where it was celebrated expressly makes it invalid for lack of such formalities; and it is claimed that the sections of the Italian code quoted do not show that such requirements are exclusive or essential. While this is, in general, true as to our marriage laws, still courts uniformly take notice of the construction given to foreign statutes by the foreign tribunals, and, to be informed of such construction, will receive the testimony of witnesses learned in the foreign law. Hoes v. Van Alstyne, 20 Ill. 201. The evidence of the Italian consul is uncontradicted as to the construction and effect given to these statutes in Italy.

It is a general rule that a marriage invalid where it is celebrated is everywhere invalid. 1 Bish. Mar. & Div., § 390. The only exceptions to this rule relate to parties sojourning in a foreign country, who may, in certain cases, contract a valid marriage without celebrating it according to the local requirements. But the plaintiff in error and said Rosalie were both Italians, and, of course, do not come within such exceptions. In McDeed v. McDeed, 67 Ill. 545, it was said that the law of the state where the marriage takes place must control as to the validity of the marriage; and in Weinberg v. State, 25 Wis. 370, on an indictment for polygamy, where the first alleged marriage was in Prussia, and it appeared that by Prussian law a marriage, to be valid, must be entered into as a civil contract before a civil magistrate, it was held that proof of a religious ceremony will raise no presumption that a civil ceremony has been performed.

If this first marriage were treated as only voidable, and not void, both parties being at the time under the age prescribed by the laws of Italy, still, when they arrived at the age of consent, either of them would, at the common law, have had the

lawful right to disaffirm it. Plaintiff in error did disaffirm it by ceasing to cohabit with the said Rosalie three months after the alleged marriage, and by abandoning her, and by afterwards marrying another woman, with whom, after he became of marriageable age, he has lived and cohabited as his wife. But the proof is uncontradicted that such marriages are absolutely void in Italy, and, whatever may be the rule of law as to such marriages celebrated in this state, still, the foreign law and its construction being shown, we should follow that law, and especially so in favor of the innocence of the accused. As the record shows there was no previous valid marriage, the conviction can not be sustained. The judgment is reversed, and the cause remanded, with directions to discharge the accused.

Reversed and remanded.

NORCROSS v. NORCROSS.

155 Mass. 425, 29 N. E. 506. (1892.)

Libel for divorce by Maria Norcross against Alvin C. Norcross. The parties were domiciled in New Hampshire, and while alone in the house of libellant's father entered into a mutual agreement of marriage. Thereupon libellee went to Boston for employment. Some months later he returned to New Hampshire, and the parties left libellant's father's home for Boston with the understanding that on their way they were to be married by a clergyman at Concord, N. H. They notified her father that the marriage had been solemnized at Concord. There was, however, no such marriage. The parties cohabited as husband and wife in Massachusetts, and on two occasions lived together openly as such for a few days in New York while visiting there. Libel dismissed on the ground that the parties were never lawfully married.

Affirmed.

ALLEN, J.: In this case, the libelant and the libelee both testified, so that the court was not left to draw inferences merely from circumstances. It was found as a fact that there was no ceremony of marriage in the presence of the libelant's father, in New Hampshire, and there was no evidence of any such ceremony elsewhere in the presence of any person authorized or supposed to be authorized to solemnize a marriage.

According to the law of New Hampshire, as declared in Dunbarton v. Franklin, 19 N. H. 257, if parties enter into a

contract of marriage between themselves, and live together in accordance with it, such facts do not constitute a marriage. We are referred to no statute or decision which shows that the law of that state has since been changed. The finding that there was no marriage under the laws of New Hampshire was therefore well warranted. The law of Massachusetts is similar, and there was nothing to show any formal ceremony of marriage here. Commonwealth v. Munson, 127 Mass. 459.

If the acts which took place in New Hampshire had taken place in New York, they probably would have been held to constitute a marriage there. Brinkley v. Brinkley, 50 N. Y. 184, 197, 198; Hynes v. McDermott, 82 N. Y. 41, 46. But there was no evidence that the parties while in New York entered into any contract of marriage between themselves. The substance of what was proved is that the parties, without being married, were living together as husband and wife in Massachusetts, and while doing so they twice went to New York together, and continued in the same apparent relation,—at one time for three days, and at another for one week. We have not been referred to any decision in New York which holds that these facts would either constitute marriage there, or afford a conclusive presumption of it; and we are slow to believe that acts which in Massachusetts were illicit will be deemed matrimonial merely by being continued without any new sanction by residents of Massachusetts while transiently across the state line. Randlett v. Rice, 141 Mass. 385, 394, 6 N. E. 238.

Decree affirmed.

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6. *Proof of Marriage.*

WILLIAMS v. HERRICK.

21 R. I. 401, 43 Atl. 1036, 79 Am. St. 809. (1899.)

Bill by George W. Williams and others against William H. Herrick, administrator of the estate of Amos W. Olney, and others, to avoid a trust. The case was heard on the question of legitimacy turning upon the existence of a marriage between Moses and Martha W. Olney. Held that the marriage was not established.

MATTESON, C. J.: We do not think the evidence establishes the existence of a marriage between Moses Olney and Martha W. Olney prior to the ceremonial marriage between them on November 4, 1817, a short time before the death of

Moses. It is not shown that any contract of marriage preceded the cohabitation, which appears to have begun on the death of Gideon Olney, the father of Moses, in 1798, and to have continued till the death of Moses, in November, 1817. But we are asked to infer a marriage from such cohabitation, the birth of children during it, and the fact that these children and their mother were known by the name of Olney.

There is doubtless, as contended in support of the claim of marriage, a certain presumption of marriage, especially in cases involving legitimacy, arising from long-continued cohabitation. But, in order to constitute evidence from which a marriage may be inferred, the origin of the cohabitation must have been consistent with a matrimonial intent, and the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby to create the reputation of a marriage. Association v. Carpenter, 17 R. I. 720, 24 Atl. 578; Commonwealth v. Stump, 53 Pa. St. 132; Reading Fire Ins. & Trust Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60; Brinkley v. Brinkley, 50 N. Y. 184; Wallace's Case, 49 N. J. Eq. 530, 25 Atl. 260; McKenna v. McKenna, 73 Ill. App. 64; Stans v. Baitey, 9 Wash. 115, 37 Pac. 316.

Inasmuch as the matters which are the subject of investigation had their beginning a century ago, and ended in the early part of the present century, the ascertainment of the facts concerning them is attended with great embarrassment. There are no contemporaneous witnesses. The court is obliged to depend upon the uncertain light of family tradition. Considerable testimony of this kind has been introduced to the effect that prior to the ceremonial marriage it was not considered in the family that Moses and Martha were married, and we think that this view is confirmed by a consideration of the entire evidence. In support of the claim of a marriage prior to the ceremonial marriage, it is contended that Moses desired to marry Martha, who was his cousin, and living in his father's family as a household servant; that his father opposed the marriage because of the inferior social station of Martha, and threatened to disinherit Moses if he persisted in his purpose of marriage. But, if this be the fact, and Moses and Martha had a matrimonial intent, it is difficult to understand why, on the death of the father, when, so far as appears, the cohabitation began, Moses and Martha should not have been regularly married, and thus placed their relations beyond a doubt. We can not help feeling that the association between Moses and Martha was not of the character now claimed for it, and that the

father's disapproval of it was for that reason. This view is strengthened by the taunts which the testimony shows were uttered by other school children to the children of Moses and Martha that their father and mother were not married, by the fact that Martha led a secluded life, and that there appears to have been but little association between her and the members of the Olney family until after the ceremonial marriage, and, finally, by the fact of the ceremonial marriage; for, even if it be conceded that this marriage was at the suggestion of Mr. Pabodie, and that it was entered into to enable Martha and her children to receive the property of Moses, which, in view of his power to give it to them by will, as he did, is not a very satisfactory explanation, it is an admission of the strongest character that their previous relations had not been those of marriage, but illicit.

And the fact that a marriage was deemed necessary by a friend, who advised it, is evidence that there was no general and uniform reputation in the community that they were married. To prove a marriage by cohabitation and reputation, the reputation must be general and uniform. Clayton v. Wardell, 4 N. Y. 230, 236; Brinkley v. Brinkley, 50 N. Y. 184, 198; Barnum v. Barnum, 42 Md. 251, 297; White v. White, 82 Cal. 427, 23 Pac. 276.

We also think that the great preponderance of evidence is in favor of the claim that Martha Olney was Martha Williams, the daughter of Martha Olney Williams and Zebedee Williams, and not Martha Rhodes, the daughter of Peleg Rhodes. We have reached this conclusion independently of the paper entitled "Monumental Genealogy," offered by the complainants, which, though we are inclined to consider it admissible as evidence, was objected to by the Rhodes claimants as incompetent.

STATE v. COOPER.

103 Mo. 266, 15 S. W. 327. (1891.)

Indictment for bigamy. Defendant was convicted. Reversed.

THOMAS, J.: The defendant was tried for and convicted of bigamy in the criminal court of Buchanan county, and was sentenced to imprisonment in the penitentiary for four years and six months, and the case is here on his appeal. The testimony shows that in the early part of April, 1887, defendant told a friend of his that he intended marrying Lavina Atkins, who

was at the time a widow. That shortly after that, in the latter part of the same month, he represented that they had married, and they commenced living and cohabiting together as man and wife, and he introduced her and held her out to the public, and in every respect treated her, as his wife, until a few days before his marriage with Eva Alexander. In the latter part of April, 1887, he went with Lavina Cooper (formerly Atkins) to Rochester, in Andrew county, on a visit to her father, and there stated that they had married in Kansas a short time before. He represented to Nelson Graves, Lavina Cooper's father, that they had had some trouble marrying; that they had to go to Kansas to get their license; that he was under age, and their parents would not let them get married here; and he had to make two trips to Kansas,—one to get the license, and another to get married. After that he held her out to his and her relatives, and to the public generally, as his wife, and they lived together as man and wife at various places in St. Joseph. During the time he had some transactions in regard to the transfer of some real estate, which they executed as man and wife. Their conduct and relations toward each other during the entire time, covering a period of over two years and a half, was that of man and wife. On November 26, 1889, he was married in Buchanan county to Eva Alexander. Shortly after this he was arrested on a charge of bigamy. The court, at the instance of the state and on its own motion, instructed the jury as follows: [Here the court sets out the instructions given, and those requested by defendant and refused. Instruction No. 3 was as follows:

"(3) The court instructs the jury that if they believe from the evidence that the defendant and Lavina C. Cooper, alias Lavina C. Atkins, for any long period of time, lived together publicly as husband and wife, that he passed himself for her husband and she for his wife, introduced himself and herself to his family and his friends and the public as her husband and she as his wife, cohabited with her as his wife and he as her husband, and held himself and herself out to the public generally as sustaining the relations of husband and wife by his general acts and conduct, then the jury are instructed that the law presumes that they were married within the meaning of the law, and that they are husband and wife, and this presumption is conclusive upon the defendant,unless he shall satisfy the jury by evidence in the case, to their reasonable satisfaction, that he was not married to Lavina C. Cooper, his reputed first wife; and that unless he shall so satisfy the jury they will convict him as charged."

The defendant excepted, and urged that the court erred in giving the instructions given as well as in refusing those requested by him.]

We are clearly of the opinion that instruction No. 3 given at the instance of the state did not declare the law properly. The fact of the marriage of the defendant and L. C. Atkins must be proved before he can be punished for bigamy. This marriage is at least a part of the corpus delicti, without proof of which no conviction can be had. The fact that a man and woman live together for a long time publicly, pass and introduce each other and cohabit as husband and wife, and say they are married, is evidence tending to prove a marriage, and may even raise a presumption that the parties were in fact married; but this presumption is one of fact, and not of law. It is the province of the jury, and not the court, to determine what probative force these facts have in a given case. No doubt the trial court gave instruction No. 3, supra, upon the authority of Cargile v. Wood, 63 Mo. 501, and Dyer v. Brannock, 66 Mo. 391; but these cases involved legitimacy, and there is a marked distinction between suits in which legitimacy of children or the sanctity of the domestic relation is at issue and those in which the effort is to impose upon defendant penalties attachable to an illegal marriage. In the first case, we have in favor of the marriage the presumption of legitimacy as well as that of good faith; in the second case, we have against the marriage the presumption of innocence. We can not, therefore, transfer the decision in the last class of cases to the former. 1 Whart., Ev., § 85. Mr. Bishop says: "It is commonly said, in this issue of polygamy, a fact of marriage, in distinction from the sort of presumptive one which suffices in civil cases, must be shown. But an examination of the question discloses the principle to be that while commonly in civil cases the proof of marriage is based on the presumption of morality and obedience to law, whereby, if parties are or have been cohabiting as husband and wife, they are deemed to be honestly and innocently so, therefore married; whereas, when this presumption is attempted to be invoked in a polygamy case, it comes in conflict with the like presumption as to the second marriage and living together; so, as presumption nullifies presumption, other proof is required." 1 Bish. Mar. & Div. § 60, and cases cited; Commonwealth v. Jackson, 11 Bush. (Ky.) 679.

The fact of marriage must be proved in a criminal case. It need not be, however, proved by direct evidence, but may be established like any other fact, by circumstantial evidence. Cohabitation, and the holding of each other out publicly as hus-

band and wife, as well as the admissions of the parties, are facts possessing evidential force, and are admissible in evidence to prove a marriage. In a case like this, however, where defendant is presumed to be innocent of the crime of bigamy, the court has no right to tell the jury how much evidence it takes to change the burden of proof from the state to the defendant. Indeed, the burden of proof is not shifted at all, but the presumption of the innocence of the accused continues with him till his guilt is established beyond a reasonable doubt. For this error the instruction under review was not the law in this case. * * *

Judgment reversed and cause remanded.

RIGHTS, DUTIES AND TRANSACTIONS OF HUSBAND AND WIFE AS BETWEEN THEMSELVES.

1. RIGHT TO FIX DOMICILE.

Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, post, p. 171.
De Vry v. De Vry, (Okla.), 148 Pac. 840, post, p. 174.

2. DUTY OF HUSBAND TO SUPPORT WIFE.

See cases under title "Wife's Contracts for Necessaries," etc.

IN RE STEWART.

(N. J. Eq.), 22 Atl. 122. (1891.)

BIRD, V.C.: S, being a married man, became insane. During such insanity his wife died, leaving a last will, in and by which, among other things, she directed that her just debts and funeral expenses should be paid. The guardian of the lunatic paid the funeral expenses of the wife out of the estate of the husband. The question is whether, since the wife had a separate estate of her own, and made provision by her will for the payment of her debts and funeral expenses, the guardian of the lunatic was justified in paying the funeral expenses of the wife or not.

Under the common law, the husband was undoubtedly liable to defray all necessary expenses incident to the decent burial of his wife. Schouler, Husb. & Wife, § 412. See notes Manby

v. Scott, 3 Smith, Lead. Cas. 1762; Jenkins v. Tucker, 1 H. Bl. 91. This is founded upon the principle of law which holds that the husband is liable for all things necessary for the comfortable support and maintenance of the wife consistent with his station or condition in life. Manby v. Scott, 3 Smith, Lead. Cas. 1714; Montague v. Benedict, Id. 1743; Seaton v. Benedict, Id. 1749, and notes; Cunningham v. Irwin, 7 Serg. & R. (Pa.) 247; Cunningham v. Reardon, 98 Mass. 538; Morrison v. Holt, 42 N. H. 478. This liability continues notwithstanding the insanity of the husband. See notes to the above case. Manby v. Scott, supra, 1767. The language of the author is: "The obligation of the husband to maintain his wife being a duty imposed by the law, and resulting from the relation between them, does not cease upon the husband's becoming insane. He continues liable for necessaries supplied to his wife, in the same way and on the same grounds as a husband who has failed to supply her with them." The same author says that it is accordingly so held where the wife's separate allowance is sufficient. Turner v. Rookes, 10 Adol. & E. 47.

The husband being liable for necessaries furnished the wife, and being so liable after he becomes insane, and being liable for the expenses of her decent burial, I can not but conclude that such liability continues after he becomes insane, even though the wife has a separate estate, and may have directed by her last will that her funeral expenses be paid. Such undoubtedly was the common law. I can find nothing in the statute that even by implication changes or qualifies the common law in this respect. Therefore I conclude that the guardian of the lunatic has a right to be reimbursed out of the moneys now in his hands, being the proceeds of the sale of real estate of the lunatic.

This does not dispose of the question whether or not it is or will become the duty of the guardian to seek to enforce the claim for these funeral expenses against the estate of the wife. There is, no doubt, strong reason for insisting that, since the wife had a separate estate, and by her will charges it with the payment of her funeral expenses, that in equity, if not in law, she intended to exonerate her husband's estate from all liability. But this question is not now considered, for the reason that all of the facts and circumstances connected with or concerning the two estates are not now before the court. I think it is not amiss to say that it deserves the consideration of the guardian before the final settlement of either estate; and, to guard against mistake, he ought to file his claim for these expenses with the executor of the wife's will.

3. CONTRACTS AFFECTING RECIPROCAL DUTIES.

RYAN v. DOCKERY.

134 Wis. 431, 114 N. W. 820, 15 L. R. A. (N. S.) 491, 126 Am. St. 1025. (1908.)

Proceedings by Edwin Ryan to establish a claim against the estate of his wife, Eliza Ryan, deceased, against Patrick Dockery, her administrator. Before the marriage of plaintiff with the decedent, who at the time was a widow with a small property, blind, and living alone, it was agreed between them that the claimant was to take care of, support, nurse, and see to the comfort of the deceased during her life, and she was to pay him therefor by giving him what property she might leave at her death for his use during his life. Judgment against claim under this contract. Affirmed.

WINSLOW, C. J. (after stating the facts): We think that the court was entirely right in changing the answer to the second question of the verdict; but, as a verdict for the defendant should have been directed upon the undisputed evidence, neither this question nor the other detail errors claimed by the plaintiff are important.

One consideration alone disposes of the plaintiff's claim adversely to him. The law requires a husband to support, care for, and provide comforts for his wife in sickness, as well as in health. This requirement is grounded upon principles of public policy. The husband can not shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they can not vary the personal duties and obligations to each other which result from the marriage contract itself. Schouler, Domestic Relations (5th Ed.) § 171; 21 Cyc. 1242. It results from this that, when the plaintiff promised to care for, nurse, and support the deceased after marriage, he promised only to do that which the law required him to do in any event, and neither the doing of what one is in law bound to do nor the promising so to do is any consideration for another's promise. 1 Page on Contracts, § 311; Post v. Campbell, 110 Wis. 378, 85 N. W. 1035. The alleged

promise of the deceased was therefore nudum pactum. The plaintiff simply performed duties required of him by law as a husband which he could not avoid or contract away, and there can be no recovery either upon express contract, nor will the law imply a contract.

Judgment affirmed.

CORCORAN v. CORCORAN.

119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. 390. (1889.)

MITCHELL, J.: This was an action by Martin Corcoran against his wife, Mary Corcoran, to recover damages for the alleged breach of an executory contract. The following are the material facts as they appear in the complaint: In January, 1871, the plaintiff was the owner of a house and lot in the city of Aurora, Ind., which was of the alleged value of $2,500, and of the rental value of $200 per annum. He avers that his wife proposed to him that if he would convey the above-mentioned property to her she would support and maintain him during his natural life, and that, in consideration of the promise and agreement above mentioned, he executed a warranty deed, conveying the property to her in fee simple. After receiving the conveyance, the defendant treated the plaintiff with great cruelty, compelled him to sleep on the floor and otherwise mistreated him, so that he was constrained to seek shelter elsewhere. He avers in his complaint that since some time in the year 1879 the defendant has refused "to maintain, support, or keep plaintiff, or to furnish any part or portion of his support, and still refuses so to do, so that plaintiff has been compelled to and does maintain and support himself, though in poor health." He charges that his maintenance and support are reasonably worth four dollars a week; that he has sustained damages in the sum of $1,300, on account of the default of his wife in the respects mentioned above, which sum he prays may be decreed to be a lien upon the land. The court rendered a personal judgment against the defendant, and entered a decree according to the above prayer.

The complaint does not state facts sufficient to constitute a cause of action. A conveyance of property from a husband to his wife is presumably a voluntary settlement or provision for her benefit, and, if it is reasonable, it will be upheld against the husband and his heirs, unless obtained by fraud or undue influence. 1 Bish. Mar. Wom. § 754; Har. Cont. Mar. Wom. § 441.

While the conveyance above mentioned was therefore presumably valid and binding, the executory contract of the wife to support her husband was void. Barnett v. Harsbarger, 105 Ind. 410, 5 N. E. 718. The law makes it the duty of the husband not only to support himself, but his wife and children as well, and we know of no rule of law, or of public policy, which gives any countenance to an attempt by a husband to abdicate the duty which the law casts upon him, and imposes it as an obligation upon his wife, through the medium of an ordinary oral contract. Harrell v. Harrell, 117 Ind. 94, 19 N. E. 621 (present term); Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907, 2 L. R. A. 343, 16 Am. St. 572. Under the enlightened policy of modern legislation, married women have been relieved of many common-law disabilities, but we have not yet progressed so far as to enable a married woman to bind herself by contract with her husband to assume his obligation to furnish support for both. Contracts between husband and wife are void in law, and are only upheld, especially against the wife, when they are supported by the clearest and most satisfactory equity. It does not appear that the plaintiff was not abundantly able to support himself, or that the property conveyed to his wife was anything more than a reasonable provision for her. It affirmatively appears in the complaint that, after the plaintiff's wife refused to abide by the contract, the plaintiff supported himself. The gravamen of his complaint is that he was obliged to earn his own support, notwithstanding the contract of his wife, by which he alleges he became exempt from that onerous burden for the remainder of his natural life. He claims that he ought now to be reimbursed at the rate of four dollars per week by way of damages, because his wife refused to do for him that which he was able to do for himself. The wrong complained of grows out of a relation which the plaintiff attempted to create with his wife by contract. The real injury complained of is that she refused to perform an agreement into which he had entered with her. The law will not permit a husband to enforce the contract indirectly, by counting on the wife's refusal to perform it as a tort. Cooley, Torts, 106; Rice v. Boyer, 108 Ind. 474, 9 N. E. p. 420. True, it appears the plaintiff conveyed the house and lot to his wife. That afforded them a place to live, but one or the other must necessarily supply the means of support. It does not appear that either had any other means of furnishing support, except their ability to work. The plaintiff assumes that, because he made the conveyance to his wife, all concern about support in the future was at an end on his part, since his wife had un-

dertaken to furnish it by contract. It does not appear that the wife had any means of obtaining support for herself, except by her own labor, and, even if it did, we are aware of no principle or precedent which would sustain a judgment for damages in favor of a husband against his wife for the breach of an executory contract, and especially a contract of the anomalous character of the one in question. The case must be regarded precisely as if the husband had conveyed the property to his wife without any contract whatever, except so far as the contract may have operated as an inducement to the conveyance. The wife had no power to make such a contract, and the plaintiff acquired no equitable right through the void contract which a court of equity can recognize. The judgment is reversed, with costs.

LEE v. SAVANNAH GUANO CO.

99 Ga. 572, 27 S. E. 159, 59 Am. St. 243. (1896.)

Claim by a wife in an action against her husband and others, in which plaintiff had judgment, that certain property taken in execution belonged to her and not to her husband. Judgment for plaintiff in the action against the claimant. Affirmed.

LUMPKIN, J.: An execution in favor of the Savannah Guano Company, against a partnership composed of Lee and two others, was levied upon certain land, as the property of Lee, which was claimed by his wife. The property was found subject, and the claimant complains here of the overruling of her motion for a new trial. Although it contains numerous grounds, the case, upon its merits, involves a single question, viz., that indicated in the first headnote.

The record discloses that, when Mr. and Mrs. Lee married, they owned no property, and were necessarily dependent upon their own labor for a support. Realizing their situation, and being very properly desirous of bettering their condition in life by the accumulation of property, they considered and discussed between themselves the question of dispensing with hired servants, and doing their own work, each to bear a fair share of the burden common to both. It was obviously contemplated that the husband should labor to procure for them the necessaries of life, and that she should keep the household and its affairs in order. This is exactly what people in their circumstances ought to do, and their conduct was altogether praise-

worthy. It further appears that they entered into an agreement by the terms of which Mr. Lee was to pay Mrs. Lee $100 per annum in consideration of her consent to dispense with servants, and her undertaking to perform with her own hands the ordinary household duties devolving upon a wife in her position.

There was nothing wrong about this agreement, and if Mr. Lee had been able to pay her the stipulated sum per annum, and at the same time pay his debts, there would have been no difficulty about the matter. We can not, however, bring ourselves to the conclusion that an agreement of this kind can be made effectual as against creditors of the husband. Mr. Lee failed to make the annual payments to his wife as agreed; and, when his alleged indebtedness to her had so accumulated as to amount to a considerable sum, he conveyed to her the land now in dispute in settlement and full satisfaction of her entire claim. This conveyance was made before the plaintiff in execution had obtained judgment against Lee upon a debt contracted by the latter prior to the settlement with his wife above mentioned.

Under the facts recited, we do not think Mrs. Lee can maintain her claim to the land in controversy. Notwithstanding the passage of the married woman's law of 1866, the wife still owes to the husband the performance of those common-law duties, and the rendering of those services which are appropriate to their surroundings and circumstances. If he labors in the field, in the workshop, or elsewhere, for her support, as is his legal duty, she can not charge him for cooking his meals, making or mending his garments, sweeping the floors of his house, milking the cow, or for other services of a like kind. Their duties are correlative, the performance of hers being no less obligatory than the performance of his. The husband is not legally bound to support his wife in luxurious idleness. If she refuses to perform her obligations, she forfeits all right to demand of him a support.

The courts uniformly protect the husband in the assertion of his lawful right to receive the benefit of his wife's services. Indeed, it is only upon the theory that the services of the wife belong absolutely to her husband that the law allows him to recover damages for torts committed upon her, by reason of which he is deprived of those services. If a husband without means is willing to take upon himself all the burdens, or if, because of the possession of adequate means, he is able to relieve his wife from all forms of drudgery, it is, in the first instance, sometimes commendable, and, in the latter, always

proper, for him to do so; but the wife can not demand such an exemption as a matter of strict legal right. It must be borne in mind that we are not now dealing with the question of the husband's appropriation of money made by his wife as earnings from work or labor performed in spheres entirely outside of her household duties and obligations. Such earnings are oftentimes exclusively her own; certainly so when her husband expressly consents to her engaging in the occupation or business from which they are realized. The present case is altogether of a different order. In reaping the benefits of his wife's services in conducting in person her household affairs, Mr. Lee gained nothing to which he was not, independently of the agreement between them, entitled, as a matter of absolute right. This is none the less true though the services she rendered may have been prompted by affection and a wifely devotion, which made her willing to save him the expense of hiring servants, which he would have been willing to incur had she so desired.

It follows that his alleged agreement with her did not amount to a contract which, in any legal sense, was based upon a valuable consideration. In cold, hard law,—which we are obliged to enforce,—it was only a nudum pactum. The deed made in pursuance of this agreement rested upon no better foundation than the alleged contract itself, and was therefore purely voluntary. We are thoroughly satisfied that the rights of a judgment creditor can not be defeated by such conveyance. Any other conclusion would tend to a disregard and neglect of those mutual obligations existing between married persons of limited means, the observance of which contributes so largely towards making the honest laboring people of this country the bulwarks of its prosperity. Judgment affirmed.

DEMPSTER MILL MFG. CO. v. BUNDY.

64 Kans. 444, 67 Pac. 816, 56 L. R. A. 739. (1902.)

Action by Laura J. Bundy against the Dempster Mill Manufacturing Company to recover a crop taken by defendant under an execution against plaintiff's husband. Judgment for plaintiff. Reversed.

POLLOCK, J.: Replevin, brought to recover a crop consisting of wheat, oats, and rye, in the stack, taken by the sheriff in execution of a judgment in favor of plaintiff in error against E. N. Bundy, husband of defendant in error, plaintiff below. Plaintiff had verdict and judgment. Defendant brings error.

There is no question of exemption involved in this action. The ground of recovery is ownership. The principal contention of error relied upon is the insufficiency of the evidence to support the judgment rendered. It appears from the record a portion of the crop in controversy was grown upon rented land; the remainder, upon land of the husband. The land was rented, and the crop sown, harvested, and stacked, by the husband. The claim made is that the personal property on the farm, used by the husband in producing the crop, is the separate property of the wife; that the husband was employed by the wife to work for her, and in payment she performed services for him; that, in all the husband did, he acted as the agent of the wife. [The court here sets out the evidence showing a contract by which the wife, who owned nothing personally, hired her husband to raise a crop for her, she, on her part, working for him in carrying mail for him and doing the housework and caring for the children.]

Does this testimony support the judgment rendered? Is an agreement between husband and wife that the husband shall work for the wife, and in payment for such service the wife shall work for the husband, each engaged in the usual and ordinary affairs of life, and that the product of such joint effort shall be the sole property of the wife, founded upon a sufficient consideration, and valid in law? If so, the judgment rendered in this case must be upheld. If not, reversal must follow. Notwithstanding the liberal statutory enactments in this state in modification of the harsh rules of the common law, authorizing and upholding the right of the wife to have, dispose of, and enjoy to the fullest extent her separate property, without the consent or interference of her husband, and notwithstanding the large and salutary measures of freedom granted a wife in the transaction of business connected with her separate estate, and in the making of contracts with all,—even her husband,— there are certain contracts between husband and wife, which, on grounds of public policy, are, and of right must continue, in this and all other jurisdictions, to be interdicted by law. Within this class of contracts falls the one upon which plaintiff bases her claim of ownership of the property in controversy in this action. It is void for want of consideration, and is contrary to public policy.

The authorities upon this proposition are a unit and conclusive. The author of 15 Am. & Eng. Enc. Law (2d Ed.) 854, says: "And notwithstanding the statutes of the various states enabling husband and wife to contract with each other, some specific contracts have been declared to be invalid, either as

being without consideration or as being against public policy." In the case of Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. 490, it is held: "An agreement by a husband to pay his wife a designated sum for her services as housekeeper is contrary to public policy and void." In Miller v. Miller, 78 Iowa 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. 431, it is held: "A contract between husband and wife by which the wife agrees to faithfully observe and perform the duties imposed upon her by her marital relations, and by which the husband agrees to provide the necessary expenses of the family, and to pay the wife, for her individual use, a certain sum annually, in monthly payments, so long as she faithfully keeps the terms and conditions of the contract, is against public policy and void."

In Corcoran v. Corcoran, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. 390, it is held: "A contract by which a wife, in consideration of a conveyance to her of real estate by her husband, agrees to support him during his natural life, is void, and the husband can not maintain an action to recover damages for the breach thereof." In re Callister, 153 N. Y. 294, 47 N. E. 269, 60 Am. St. 620, it is held: "Though a woman is serving a man in the capacity of clerk, upon an agreement to pay her an annual compensation of five hundred dollars, such employment to continue as long as he practices law, and such payment not to be made until he retires from business, he, upon their subsequent marriage, becomes entitled to her services without payment. She need not continue serving him as a clerk, but, if she does, she can not enforce a promise to pay therefor, however solemnly made. The legislation of the state of New York upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not by express provision nor by implication, deprived him of his common-law right to avail himself of a profit or benefit from her services." In a note to Trust Co. v. Chapin, supra, found in 58 Am. St. 490 (s. c. 64 N. W. 334), it is said: "If the services performed by the wife, for which her husband agreed to pay her, were in the nature of ordinary marital or household duties, of course, his agreement to pay for them was not binding upon him, because without consideration, and his compliance with it must be deemed a mere gift to his wife, not sustainable as against his creditors, except as under the same conditions as would permit the sustaining of any other voluntary transfer by him; and therefore his creditors have the right to any property received by her from him in carrying out

his agreement that they have to any other property given by him to her." Switzer v. Kee, 146 Ill. 577, 35 N. E. 160; Gable v. Cigar Co., 140 Ind. 563, 38 N. E. 474; Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. 490; Apple v. Ganong, 47 Miss. 189; Reynolds v. Robinson, 64 N. Y. 589; Bucher v. Ream, 68 Pa. 421; Campbell v. Bowles' Ex'rs, 30 Grat. (Va.) 652; Elliott v. Bently, 17 Wis. 591.

It follows, the claim of plaintiff to the property in controversy, being founded upon a contract prohibited by public policy, and lacking the essential element of consideration, is void as to the creditors of her husband; and, unless other valuable considerations may be shown in support of such contract and her right to the property, no recovery can be had.

Judgment reversed, and case remanded for new trial in accordance with this opinion. All the justices concurring.

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4. WIFE'S EARNINGS UNDER STATUTES.

HARMON v. OLD COLONY RAILROAD CO.

165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. 499. (1896.)

Action by Lydia W. Harmon against The Old Colony Railroad Company for personal injuries. Plaintiff was a married woman conducting a restaurant on her own account. As an element of damages she alleged the loss of her own labor and services. Evidence as to their value was excluded, and the jury were instructed to consider only what would compensate plaintiff for the mental and physical pain she endured and her loss of capacity to enjoy life. Verdict for plaintiff for $2,200. Plaintiff excepted. Exceptions sustained.

ALLEN, J.: The general question arising in this case is whether, in an action brought by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor can be considered as an element of the damages. By St. 1846, ch. 209, § 1, it was enacted that "in all cases where married women shall hereafter by their own labor earn wages, payment may be made to them for the same." This was followed by St. 1855, ch. 304, § 7: "Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services

shall be her sole and separate property and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services and earnings; and her property acquired by her trade, business and service and the proceeds thereof, may be taken on any execution against her." By St. 1857, ch. 249, § 6, it was provided that a husband should not be bound by his wife's contracts in respect to her separate property or to her trade. The rights of married women in respect to their labor are thus defined in Gen. St. ch. 108: Section 1. "The property, both real and personal which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor or services carried on or performed on her sole and separate account * * * shall notwithstanding her marriage, be and remain her sole and separate property and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts." Section 3: "A married woman may bargain, sell and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business and perform any labor or services on her sole and separate account and sue and be sued in all matters having relation to her separate property, business, trade, services, labor and earnings in the same manner as if she were sole." Section 5: "The contracts made by a married woman in respect to her separate property, trade, business, labor or services shall not be binding on her husband, nor render him or his property liable therefor; but she and her separate property shall be liable for such contracts in the same manner as if she were sole." Section 6: "Payment may be made to a married woman for wages earned by her labor," etc. By Stat. 1862, ch. 198, amended by Stat. 1881, ch. 64, § 1, a married woman doing business on her separate account must record a certificate in the town or city clerk's office setting forth various particulars, or her husband may file such certificate. In case of failure to do so, her property will not be protected against his creditors, and he will be liable on her contracts. By Stat. 1874, ch. 184, §1, "a married woman may * * * make contracts oral and written, sealed and unsealed in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account." And by section 3 "a married woman may sue and be sued in the same manner

and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife." This enumeration of statutes shows the growth of the legislation on this particular subject, and the foregoing provisions are now embodied in a somewhat compressed form in Pub. Stat. ch. 147.

By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirements as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society, companionship, and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right, in these respects, is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her services is abridged, though his obligation to support her remains.

It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which, perhaps, may require her absence for ten years, thus amounting to a desertion which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would per-

mit such action on her part against his consent. To a certain limited extent—as, for example, in fixing the domicile, and in being responsible, under ordinary circumstances, for its orderly management—the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control.

In the case now before us the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case.

The radical nature of the change effected by the legislation of this state in the legal condition of married women is illustrated in numerous decisions, of which Jordan v. Railroad Co., 138 Mass. 425, most nearly resembles the present case. But see, also, Parker v. Simonds, 1 Allen (Mass.) 258; Ames v. Foster, 3 Allen (Mass.) 541; Plumer v. Lord, 5 Allen (Mass.) 460; Chapman v. Foster, 6 Allen (Mass.) 136; Stewart v. Jenkins, Id. 300; Chapman v. Briggs, 11 Allen (Mass.) 546; Burke v. Cole, 97 Mass. 113; Snow v. Sheldon, 126 Mass. 332; Read v. Stewart, 129 Mass. 407; Bank v. Windram, 133 Mass. 175; Butler v. Ives, 139 Mass. 202, 29 N. E. 654; Binney v. Bank, 150 Mass. 574, 23 N. E. 380.

Exceptions sustained.

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5. Wife's Interest in Husband's Personal Property.

HALL v. HALL.

109 Va. 117, 63 S. E. 420, 21 L. R. A. (N. S.) 533. (1909.)

Suit by the widow of James A. Hall to set aside a deed executed by him. Decree for defendants. Affirmed.

WHITTLE, J.: Shortly before his death, J. A. Hall, who had been twice married but was childless, made his will disposing of his real estate, his household and kitchen furniture, and certain other personal estate, to various persons, mainly to his brother and nephews; but he also devised to his wife, Nellie Hall, the appellant, the farm known as the "Burton land," and a house and lot in the village of Hallwood which devises the

will declared were not to be in lieu of her dower in his other lands. He likewise bequeathed to her certain personal property.

At the same time, Hall executed a deed conveying the bulk of his personal estate, comprising bonds and stocks aggregating $35,000, to trustees. The deed sets out accurately the securities conveyed and the names and shares of the respective donees, and clearly defines the power and duties of the trustees. Thus, the trustees are empowered and directed to collect the interest and dividends on the principal fund for the use and benefit of the grantor during his life, and, if any portion of such interest and dividends should remain at the time of his death, it was to fall into and become a part of his estate. With regard to the corpus of the principal fund, the trustees were clothed with wide discretion to invest and reinvest the proceeds for the benefit of the cestui que trustent until the grantor's death, the period fixed for the final distribution of that estate.

All of the beneficiaries, with a few exceptions, were relatives or connections of the grantor, and the fund was to be divided among them according to their designated portions; the appellant's share being $3,000.

Upon the death of Hall, his widow renounced the provision made for her by his will and elected to take her dower and distributive share in the estate. She, moreover, brought this suit to set aside the deed and enforce her rights as widow under the statute.

The plaintiff rests her case upon the allegations that the conveyance is inoperatitve as a deed, because it was never delivered, and that it is also ineffectual for the further reason that, while the writing is in form a deed of trust, it is in reality a will in disguise—a devise resorted to by the grantor to enable him to retain dominion over his personal estate until his death, and at the same time to deprive his widow of her distributive share therein. Yet, inasmuch as the paper is in fact a will, it is void because not executed in accordance with the requirements of the statute.

From a decree sustaining the validity of the deed, this appeal was allowed.

The testimony was chiefly directed to the question of the delivery of the deed. Without undertaking a review of the evidence, it is sufficient to state that it satisfactorily shows that the deed was duly executed, acknowledged for registry, and delivered by the grantor to one of the trustees, and accepted by him without condition. The legal consequence of these acts was to operate a complete divestiture of the grantor's title to the prop-

erty conveyed, and to invest it in the grantees, upon the trusts and for the uses declared by the deed. 1 Devlin on Deeds (2d Ed.) § 300.

With respect to the contention that the deed is a will in disguise, the instrument speaks for itself. It is unmistakably what it purports to be, a deed of conveyance of personal property, and possesses all the attributes which attach to that species of conveyance. It is true the circumstances surrounding the transaction leave no room for doubt that it was Hall's purpose to limit the rights of his wife in his estate to the provision made for her by his will and deed. Nevertheless, if in so doing he has not transcended his legal rights, she can not be heard to complain; nor can the courts impugn his conduct, no matter what may have been the actuating motive.

The fact that the precise question involved in this case has been twice decided by this court renders unnecessary a discussion of the power of the husband to disappoint his widow by divesting himself of title to his personal estate in his lifetime. Of course, this doctrine is not to be confounded with the principles applicable to dispositions of property made in contemplation of marriage.

In the case of Lightfoot's Executors v. Colgin and Wife, 5 Munf. (Va.) 42, it was held that: "A wife has not such an interest in that portion of the personal estate of her husband to which she may be entitled in the event of his dying intestate, or leaving a will which she may renounce, as that an absolute and irrevocable, though merely voluntary, deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance. A deed of trust, if not revocable by the grantor, is not to be considered a will in disguise, on the grounds that nearly all his personal state is thereby conveyed, and that he reserves to himself the possession and control of the property during his life."

It is interesting to note that this case was argued January 21, 1813, but was not decided until February 14, 1816. All five of the judges delivered opinions, and the question at issue was exhaustively considered. The conclusion reached by the majority is a correct exposition of the common-law doctrine applicable to the case, while most of the English precedents relied on by the minority seem to have been controlled by the custom of particular places, and consequently form no part of the common law of this state.

The question was again before the court in the year 1850, in Gentry et al. v. Bailey, 6 Grat. (Va.) 594, and the court, following the decision in Lightfoot's Executors v. Colgin and Wife,

5 Munf. (Va.) 42, held that "a conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and though he retains the power to sell and reinvest or account, and also to reappoint among specified objects, is valid to bar the wife of her distributable share therein."

Mr. Minor states the rule as follows: "But whilst the husband can not defeat the wife's claim to her distributive share by will, he may do so by an irrevocable disposition of the property in his lifetime, although he secure a life estate to himself, and although his declared purpose is to disappoint the wife's claim as one of his distributees." 3 Min. Inst. pt. 1, 530.

Our attention has been called to decisions which indicate that a different rule obtains in some of the other states of the Union; but we have no disposition to depart from our own well-considered precedents, which have withstood the test of time and attained the dignity of canons of property rights in this jurisdiction.

The case in judgment is ruled by our own decisions, and the decree of the circuit court which followed them is without error and must be affirmed.

Affirmed.

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6. WIFE'S PARAPHERNALIA—GIFTS FROM HUSBAND TO WIFE.

FARROW v. FARROW.

72 N. J. Eq. 421, 65 Atl. 1009, 11 L. R. A. (N. S.) 389, 129 Am. St. 714. (1907.)

Action by a wife against her husband to recover for certain personal property. Judgment for plaintiff. Affirmed in part and reversed in part.

TRENCHARD, J.: This is an appeal from a decree of the Court of Chancery. The bill was filed by Ethel Farrow, the respondent, against her husband, William Farrow, Jr., the appellant, who was living apart from her, for the recovery of the possession or the value of one solitaire diamond ring, one turquoise ring with sixteen small diamonds around it, and one pair of diamond earrings, that were in the possession of the wife at the time her husband separated from her, and which were then

taken by him forcibly, and since have been converted to his own use. In the bill, the complainant averred that these jewels had been given to her by her husband, the defendant, and that he had allowed her to apply them to her separate use. The prayer of the bill is that the defendant "may be ordered and decreed to deliver to your oratrix forthwith said personal property, or, in case he has sold or parted with the same, he may be ordered and decreed to pay to your oratrix such sum or sums as shall be a fair value of the same."

The answer of the defendant denies that the complainant was or is the owner of the said jewels; denies that he gave them to her, and that he allowed her to apply them to her separate use. It avers that the defendant "bought and purchased the jewelry mentioned in the bill of complaint for the personal adornment of his wife, the complainant, but that he never gave said jewelry, or any part thereof, to his wife, and never parted with his title or possession to said jewelry, and that they are his property and in his possession." At the hearing it appeared that the defendant had parted with the jewelry, and the Court of Chancery decreed "that the defendant pay unto the complainant by way of compensation for said solitaire diamond ring, turquoise ring with sixteen small diamonds around it, and a pair of diamond earrings, the sum of $670."

On this appeal, we are not concerned with that part of the decree which awards compensation for the solitaire diamond ring, because it appeared at the hearing that it was given by the husband to the wife before their marriage as an engagement ring. The gift was absolute, and the property remains hers, notwithstanding the subsequent marriage. This is admitted to be the legal situation by the defendant. To the extent that the decree directed payment for the value of the solitaire diamond ring which was shown to be $130, it was admittedly proper. The controversy on this appeal is concerning the propriety of the decree so far as it relates to the turquoise ring and the diamond earrings, together valued at $540. The complainant, the wife, claims that this jewelry was given to her by her husband during coverture; that it was bought on the installment plan, and that a considerable amount of the purchase money still remained unpaid at the time when the husband took possession of it. This is stated to be the fact by the wife, who says the unpaid amount was somewhere about $300. She then goes on to say: "We paid so much a month. We undertook to pay $40 per month. We didn't always pay that much. We paid what we thought we could. We thought it was money saved to buy the diamonds. That was the agreement between Will and me.

That was the reason we bought them." In the same connection she says: "I don't remember any such conversation before Mr. Eldridge. No, we talked about these affairs between ourselves. Q. Between yourselves? A. Not before Mr. Eldridge. Q. Then after you were by yourselves? A. Yes, sir; at times we talked over buying diamonds to save money, we did; yes." The testimony shows beyond question that the jewelry was purchased with the husband's money. It therefore was his property, unless it was bestowed by him upon his wife as a gift. A gift of personal property from husband to wife must be clearly proved. There must be a clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it and of vesting title in the wife. Skillman v. Skillman, 13 N. J. Eq. 403; Dilts v. Stevenson, 17 N. J. Eq. 407. See, also, 14 Am. & Eng. Encyl. L. (2d ed.) 1033, and cases there cited.

Applying these principles to the case under consideration, we find nothing to justify the claim of the wife that the jewelry was bestowed upon her by her husband as a gift. The evidence shows that it was purchased by the husband, not as a gift to his wife, but as an investment for their joint benefit, and also for the purpose of ornamenting the wife on suitable occasions; in other words, either it remained the absolute property of the husband, or, at most, it became the wife's paraphernalia. In either event, the husband was entitled to take possession of it, and deal with it as he saw fit. Of course, this is true if it became his absolute property, and there remains only to be considered the legal situation if it became the wife's paraphernalia.

At common law, the husband is bound to maintain the wife, and to provide her with suitable clothing appropriate to their degree, and his own circumstances and social position. That common-law obligation still rests upon the husband. As corollary to this obligation, the common law recognizes that articles of clothing, and personal ornaments appropriate for the wife, which are purchased with the husband's money, or upon his credit, are his property, notwithstanding the fact that they are selected and purchased by the wife, or are intended for her personal and exclusive use. The wife's clothing and ornaments are called her paraphernalia, and the common-law rule, that the ownership thereof during the life of the husband was in him, remains in force in all jurisdictions where that rule has not been abrogated by statute. It had not been abrogated in this state by the married woman's act (Gen. Stat., p. 2012), or by any other statutory provisions. Except in cases where the wife herself purchases the paraphernalia with her own separate money

or earnings, the rule remains exactly as it stood at common law. In Massachusetts, it has been judicially declared that the common-law rule still prevails because of the absence of statutory provision changing it. Hawkins v. Providence & Worcester Railroad, 119 Mass. 596, 20 Am. Rep. 353. So, too, in Michigan, the same rule prevails, and for the same reason. Smith v. Abair, 87 Mich. 62, 49 N. W. 509. If, therefore, the jewelry became the paraphernalia of the wife, then the common-law doctrine of paraphernalia applies, and that is this: That "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life." Schouler's Domestic Relations (5th ed.), p. 208.

So much of the decree as adjudges that the defendant make compensation unto the complainant for the turquoise ring with sixteen small diamonds around it, and for the pair of diamond earrings, should be reversed. As the complaint was admittedly entitled to a decree for the value of the solitaire diamond ring, which was $130, she is entitled to costs in the court below.

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7. ANTENUPTIAL SETTLEMENTS.

LANDES v. LANDES.

(Ill.) 108 N. E. 691. (1915.)

Suit by Bertie A. Landes to cancel an antenuptial contract. Decree for defendants. Affirmed.

WATSON, J.: This litigation concerns the estate of Silas Z. Landes, deceased, and arises upon a bill in equity filed by his widow, Bertie A. Landes, against his children, Bernard S. Landes and Pauline S. Eichhorn, and the executor of his will, certain trustees, and all devisees and legatees named in the will. Prior to the filing of the bill the widow filed the statutory renunciation of the benefits conferred upon her by the will and her election to take from the estate under the laws of the state. The cause was heard before the chancellor upon an amended bill (which will be referred to herein as the bill), the answer of the several defendants (one of whom, being a minor, answered by a guardian ad litem), and replications to the answers.

The evidence was taken and heard in open court, and without reference to a master in chancery, and a decree was rendered finding the isues for the defendants and dismissing the bill for want of equity, at complainant's cost. Thereupon this writ of error was caused to issue out of this court; thus bringing the record before us for review.

The purpose and object of the bill here under consideration are to have canceled and declared void a certain antenuptial contract made by and between the complainant, while her name was Bertie Carpenter, and Silas Z. Landes, bearing date July 16, 1909, the execution of which contract by the complainant, she alleges, was the result of fraud and deceit practiced upon her by the other party thereto, he being her affianced husband, and it is the duty of this court to determine whether the decree of the circuit court is justified by the law and rests upon a sound basis in evidence that is both credible and free from legal objection.

[The court here sets out the substance of the contract, the property involved, the previous relations of the parties and the circumstances attending the execution of the contract. The contract was executed and the marriage celebrated in 1909, and the husband died in 1910. After giving the history of the case, the court continues:]

The relation of the parties, being confidential, calls for the exercise of a high degree of fairness and good faith on the part of each. Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712; Taylor v. Taylor, 144 Ill. 436, 33 N. E. 532; Achilles v. Achilles, 151 Ill. 136, 37 N. E. 693; Russell v. Russell (C. C.) 129 Fed. 434; Kline v. Kline, 57 Pa. 120, 98 Am. Dec. 206; 2 Beach on Contracts, § 1300. If the provision for the wife is disproportionately small, those contending for the validity of the contract have the burden of proving knowledge in the wife of all facts materially affecting her rights. Warner v. Warner, 235 Ill. 448, 85 N. E. 630; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22. Reputation for wealth is not sufficient to charge the woman with notice of the kind and amount of the man's property. Mines v. Phee, 254 Ill. 60, 98 N. E. 260. The rules governing the construction of contracts apply here. Collins v. Phillips, 259 Ill. 405, 102 N. E. 796, Ann. Cas. 1914C, 188. Antenuptial contracts should be dispensed with if they are to be held invalid solely because the wife does not receive as much as she would if there were no contract. Stokes v. Stokes, 240 Ill. 330, 88 N. E. 829. The surrounding circumstances and the ownership by the parties of farms in the same neighborhood show the wife reasonably should have had knowledge of the value of the

husband's property. Achilles v. Achilles, supra; Yarde v. Yarde, 187 Ill. 636, 58 N. E. 600.

Applying now the said principles to the contract here involved and to the facts surrounding it, we find that, upon sure information imparted to her by her father and by Ramsey, plaintiff in error knew Judge Landes was worth somewhere from $100,000 to $200,000. If she chose to take the lowest figure as correct, she was apparently willing to make the bargain for $10,000, a sum vastly less than she would have received had she become his wife without a business arrangement. The estate proved to be worth about $130,000, of which some $85,000 was in real estate. Allowing for the facts that some of his personal holdings were worth more than par, that he had made some small changes in the identity of his property, and that he had received considerable income between the date of the contract and his death, we conclude he made a more detailed and accurate statement of his property to his intended wife than the rules of law or equity require.

It will be observed that he listed his personal property at its par or face value, and did not value his real estate in the contract. Valuations, both on real and personal properties, are but estimates, and Judge Landes was under no legal obligation to inform his betrothed as to his estimates of value, but he was required to, and we think did, inform her substantially as to what he owned, and he was required to so describe and locate his property as to enable the plaintiff in error, by the use of ordinary means within easy reach of every intelligent person, to determine the truth and accuracy of his statements. Taylor v. Taylor, supra; Achilles v. Achilles, supra; Hessick v. Hessick, supra; Yarde v. Yarde, supra. Having known Judge Landes well from her childhood, having lived for many years in the same small community, having, by inheritance, real estate, both farm and city property, not remote from his own, being well acquainted among the professional and business men of Mt. Carmel (one of the latter being her son-in-law), it would have been no difficult matter for the plaintiff in error to get reliable estimates of value on the items of real and personal property mentioned in the contract, a copy of which she seems to have had almost three weeks after it was signed and before the marriage.

We hold also that this contract was fully ratified and confirmed by the plaintiff in error on several different occasions after the marriage, notably: (1) When she wrote a receipt on it for $50 on September 15, 1909; (2) by the execution of the contract prepared by Kolb the day before her husband's death,

containing the clause expressly ratifying and confirming the antenuptial contract; (3) in her conversation with Trustee Risley about collecting the balance due, after her husband's death; and (4) by signing a receipt for $500, on account of the contract, at the bank, on August 26, 1910.

There are other objections to, and criticisms of, the decree and of the rulings of the court upon the admission of evidence which we do not find it necessary to consider and pass upon in detail, but from what is above said we have, no doubt, made it clear that Judge Landes committed no fraud and practiced no deceit upon the plaintiff in error in order to induce her to execute the contract now complained of; that after her marriage, and after his death, she ratified and confirmed the contract freely and voluntarily and without the practice of fraud or deceit by any one.

The decree of the circuit court must be and is therefore, affirmed.

Decree affirmed.

PREWIT v. WILSON.

103 U. S. 22, 26 L. Ed. 360. (1880.)

Suit to set aside an antenuptial settlement for fraud on grantor's creditors. Decree for plaintiff. Reversed with directions to dismiss the bill.

MR. JUSTICE FIELD delivered the opinion of the court.

On the 27th of April, 1866, Mrs. Josephine Prewit was a widow, only twenty years of age. Her husband was the late John Prewit. Not many months after his death another Mr. Prewit—Richard, this time—proposed marriage to her. He was of mature age, being in his fifty-eighth year. His proposal was rejected. He renewed it, and accompanied it with a promise to settle upon her, if she would consent to the marriage, a large amount of property. This promise moved her to consent. The deed of settlement was accordingly executed, and in May following the marriage took place. Both parties affirm that the marriage was the only consideration for the settlement, and it is so stated in the deed.

A little more than two years and a half afterwards,—in December, 1868,—the husband was adjudged to be a bankrupt in the District Court of the United States for the Northern Dis-

trict of Alabama, in proceedings taken upon his own application; and in the following month the plaintiff was appointed assignee of his effects, and to him an assignment was made. The present suit is brought by him to set aside the deed of settlement, on the alleged ground that it was executed by Prewit to defraud his creditors.

At the time of the settlement Prewit was the holder of a large amount of property, consisting chiefly of lands in Alabama, but was indebted in an amount greater than their value. It is stated that his property was not worth more than $50,000, and that his debts exceeded $70,000.

It would seem from the evidence, and we assume it to be a fact, that he was insolvent at the time he executed the deed of settlement, in the sense that his debts largely exceeded the value of his property. It may also be taken as true, as far as the present suit is concerned, that he intended by the deed to hinder, delay and defraud his creditors, and that he made the settlement to place his property beyond their reach.

There is no evidence that Mrs. Prewit was aware at the time of the amount of property he held, or of the extent of his debts, or that he had any purpose in the execution of the deed except to induce her to consent to the marriage. It is not at all likely, judging from the ordinary motives governing men, that whilst pressing his suit with her, and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would, by the deed he proposed to execute, defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was at that time anxious to secure. If capable of the fraud charged, he was capable of deceiving Mrs. Prewit as to his pecuniary condition. She states in her answer that she knew he was embarrassed and in debt, but to what extent or to whom she did not know, and that it was because of the knowledge that he was embarrassed that she insisted upon his making a settlement upon her. The deed itself shows that he owed a large sum, for of the 6,770 acres of land embraced by it, 2,185 acres were charged with the payment of certain designated debts to the amount of $18,000. A knowledge of these facts justified her in saying that she knew he was embarrassed; but they rather dispelled than created any suspicion that he had a design to defraud his creditors. Her statements do not warrant the inference of knowledge of any such purpose, much less of any assent to its execution. Besides the property charged in the deed with the payment of

the large amount of indebtedness mentioned, he owned 4,700 acres of land not included in it, and personal property of the value of several hundred dollars.

When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.

Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes, that, "Marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by unquiet or repose to the state; by what money ordinarily buys and by what no money can buy, to an extent which can not be estimated or expressed, except by the word 'infinite.' To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth." And, also, that, "Marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value." Law of Married Women, §§ 775, 776. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an antenuptial settlement. Barrow v. Barrow, 2 Dick. 504; Nairn v. Prowse, 6 Ves. Jr. 752; Campion v. Cotton, 17 Ves. Jr. 264; Sterry v. Arden, 1 Johns. (N. Y.), ch. 261; Herring v. Wickham, 29 Gratt. (Va.) 628.

In Magniac v. Thompson this court said that, "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud and the other party have no notice of it, but is innocent of it, she is not and can not be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution." 7 Pet. (U. S.) 348, 393. The same doctrine is asserted by the Supreme Court of Alabama, in which state the parties to the deed of settlement reside and in which it was executed. Andrews v. Jones, 10 Ala. 400.

According to these authorities there can be no question of the validity of the settlement in this case. There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an antenuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement.

It follows that the decree of the court below must be reversed, and the cause remanded with directions to dismiss the bill of complaint; and it is so ordered.

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8. POSTNUPTIAL SETTLEMENTS.

WILLIAMS v. HARRIS.

4 S. Dak. 22, 54 N. W. 926, 46 Am. St. 753. (1893.)

Action by Mrs. Annie E. Williams and another to set aside a sale on execution by defendant Harris, as sheriff, of certain property which had been conveyed to Mrs. Williams by her husband a short time before the sale, and which has been sold by defendant to satisfy judgments against plaintiff's husband. Judgment for plaintiffs. Affirmed.

BENNETT, P. J.: * * * The appellants further contend that the conveyance of the lands and lots made by Williams, the husband, to his wife, was fraudulent, and was made to hinder, delay, and defraud creditors, and therefore void. "Fraud" is a difficult thing to define. Courts have skilfully avoided giving a precise and satisfactory definition of it, so various are its forms and colors. It is sometimes said to consist of "any kind of artifice employed by one person to deceive another," conduct that operates prejudicially on the rights of another, or withdraws the property of a debtor from the reach of creditors. McKibbin v. Martin, 64 Pa. St. 356; Shoemaker v. Cake, 83 Va. 5, 1 S. E. 387. It is to be inferred, or not, according to the special circumstances of every case. It

is the judgment of law on facts and intents. Pettibone v. Stevens, 15 Conn. 26; Sturtevant v. Ballard, 9 Johns (N. Y.) 342. Its existence is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted. Belford v. Crane, 16 N. J. Eq. 265. Fraud is always a question of fact, with reference to the intentions of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, which are to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test. U. S. v. Amistad, 15 Pet. (U. S.) 594; Loyd v. Fulton, 91 U. S. 485; Humes v. Scruggs, 94 U. S. 22; Knowlton v. Mish, 8 Sawy. (U. S.) 627, 17 Fed. 198. To establish fraud the evidence is almost always circumstantial. From the nature of the case, it can rarely ever be proved otherwise; and if the facts and circumstances surrounding the case, and directly proved, are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires.

The above may be considered the general principles in relation to fraud, as applied to the ordinary transactions of life. The question of dishonesty in this transaction rests solely upon the ground that it was made by an insolvent debtor to his wife. Husband and wife have been made, by legislation, independent legal personages in most, if not all, of the states; the statute conferring upon married women the power to hold and convey property much the same as though they were single. This fact has sometitmes encouraged husbands to confide to the keeping of their wives property which should have been turned over to the creditors of the husband. A debtor, when threatened with insolvency, naturally reposes confidence in his wife, and there may be instances when she becomes wrongfully possessed of funds and property which the law says, of right, should be diverted to the payment of the husband's debts; but as was said in Patton v. Conn, 114 Pa. St. 183, 6 Atl, 468, "A wife can become an honest creditor of her husband, and he may pay an honest debt to her, though, as to other creditors, the claims may appear stale and ancient."

In many respects a wife may, under the existing policy of the law, deal with her husband, as regards her separate estate, upon the same terms as though the relationship had no existence. Thus, in a recent case in Massachusetts (Bank v. Tavener, 130 Mass. 407), in which the opinion was rendered by Chief Justice Gray, now one of the justices of the Supreme Court of the United States, it was decided that where the wife loaned her husband, upon the promise of repayment, money

constituting a part of her separate estate, a conveyance of land made by him to her through a third person, in repayment of such loan, and free from a fraudulent design, would be valid against his creditors. See, also, Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351; Tomlinson v. Matthews, 98 Ill. 178; Jewett v. Noteware, 30 Hun 194; French v. Motley, 63 Maine 326; Grabill v. Moyer, 45 Pa. St. 530; Langford v. Thurlby, 60 Iowa, 105, 14 N. W. 135.

Transactions between husband and wife, to the prejudice of the husband's creditors, however, are usually scanned closely by the courts, and the good faith in them must be clearly established. As was observed in the case of Hoxie v. Price, 31 Wis. 86, "on account of the great facilities which the marriage relation affords for the commission of fraud, these transactions between husband and wife should be closely examined and scrutinized, to see that they are fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors." In all such cases the parties are under the temptation to do themselves more than justice. In Post v. Stiger, 29 N. J. Eq. 556, the court says: "A claim by a wife against the husband, first put in writing when his liabilities began to jeopardize his future, should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties, alone, uncorroborated by other proof, should be rejected at once, unless their statements are as full and convincing as to make the fairness and justice of the claim manifest." Lee v. Cole, 44 N. J. Eq. 328, 15 Atl. 531.

A transfer of a considerable portion of property by a debtor, when in failing circumstances, to his wife, immediatetly after acquiring it, may excite suspicion, and, unexplained, may seem a presumption of fraud. But parties may always come in, and remove all taint of suspicion, by showing the utmost good faith in the transaction.

In the case at bar the plaintiff has shown, in a very clear and convincing manner, that she on several occasions had loaned her husband various amounts of money to assist him in carrying on his business, and that these several amounts were evidenced by his promissory notes, which were unpaid on the day the transfer in question was made. Then he stated to her that he had sold his stock of goods for this property and several tracts of land; that he was unable to pay her the money due her in cash, but he would give her this real estate for the notes she held against him. This she assented to, and the transfer was made. Furthermore, the plaintiff shows that the

money loaned to her husband was of her own separate estate,—money obtained by her from her father's estate, and money earned by her teaching school,—and that none of it came from her husband. The separate property rights of husband and wife, and their independence from each other in business transactions, are carefully defined and established by our statutes. See §§ 2589, 2590, 2593, 2594, 2600, Comp. Laws.

Even the fact that the husband has a fraudulent intent will not defeat the title, unless the wife knows he has such fraudulent intent. In the case of Manufacturing Co. v. Mastin, (Iowa), 39 N. W. Rep. 219,—a case clearly in point,—the court said of the wife: "She was a creditor of her husband, and he had the right to secure and pay her, as any other creditor. He conveyed, and she accepted, land in payment for such indebtedness; and it is immaterial if her husband did at the same time sell, substantially, all the property he had, and it is immaterial if it was done hastily, with an apparent design to place the title of the property beyond the reach of the plaintiffs, for the reason that Robert Mastin had the right to prefer one creditor to another, and his wife had the right to insist on, and accept, all she was legally entitled to. The value of the land did not exceed the amount of the indebtedness." See, also, Buhl v. Peck, 70, Mich. 44, 37 N. W. 876; Deering v. Lawrence, 79, Iowa 610, 44 N. W. 899. In the case at bar the testimony of Mrs. Williams and the testimony of Williams is clear and undisputed that the purpose and intent in making the transfer were for the payment of the money loaned by the wife to the firm of Williams & Pryce and to William B. Williams, the grantor. Under the facts established by the evidence the court below was clearly right in its judgment, and it is affirmed.

BEECHER v. WILSON.

84 Va. 813, 6 S. E. 209, 10 Am. St. 883. (1888.)

Suit to set aside a postnuptial deed of settlement, as fraudulent as against grantor's creditors. Settlement set aside. Decree affirmed.

FAUNTLEROY, J.: This is an appeal from the decree of the Circuit Court of King William County, entered on the 25th day of October, 1886, in a chancery cause therein pending, wherein the appellees, Wilson, Burns & Co., and

others, are complainants, and the appellants, O. Beecher, Jr., trustee, O. Beecher, and Angelina Beecher, his wife, are defendants. On the 21st day of April, 1885, O. Beecher was the owner of a valuable farm in King William County, Va., called "Riverside," containing 398 acres, which was conveyed to him April 17, 1879, for the purchase price of $6,870, which farm was well stocked, and upon which the said Beecher erected a valuable dwelling and other improvements. At that time the said O. Beecher was heavily indebted; and on the said 21st day of April, 1885, he conveyed 350 acres of the said farm, and all personal property thereon, including the stock and crops, to his son, O. Beecher, Jr., as trustee, for the seperate use of his wife, Angelina Beecher. On the 4th day of January, 1886, the bill in this cause was filed, charging that the said deed of settlement was without valuable consideration, fraudulent, and void, and made with intent to hinder, delay, and defraud creditors, and praying that the said deed be vacated and set aside, and the land settled thereby be sold, and the proceeds applied to the payment of complainants' debts. The defendants, O. Beecher, and Angelina Beecher, his wife, and O. Beecher, Jr., trustee, answered the bill, and denied the allegations of fraud, and averred that the deed was made for a valuable consideration, and with bona fide intent, in consideration of the money of the wife, Angelina Beecher, having been, at various times and ways set forth in the payment of the purchase money for the Riverside farm, to the aggregate amount of $5,900, upon a contemporaneous agreement that she should be properly secured therefor. Depositions were taken, and at the hearing of the cause the court held the deed of settlement to be without valuable consideration, and made with intent to hinder, delay, and defraud creditors, and therefore fraudulent and void; and from the decree to this effect this appeal is taken.

The deed of settlement of April 21, 1885, which is attacked by creditors whose debts or claims against the husband and settler antedated the deed, and are admittedly just, is in date, in form, in fact, and in every characteristic feature, a post-nuptial settlement,—a conveyance, by a husband heavily indebted, of all his property for the benefit of his wife, which expresses on its face "free of all debts made by himself"; and the value of the property conveyed is far in excess of what is alleged, but not proven, to be due to the wife. Under the repeated early and late decisions of this court, the settlement is prima facie fraudulent and void as to existing creditors and presumed to be voluntary, unless those claiming under it

can show that it was made for a valuable consideration, in good faith, and upon a contract or agreement coeval, or so nearly coeval with the appropriation and the settlement as to support the presumption of fair dealing, and repel the presumption of law that the settlement is a mere resort or contrivance for putting the property of the husband beyond the reach of his creditors. Blow v. Maynard, 2 Leigh, 30; Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 463; Perry v. Ruby, 81 Va. 317, 321; and Robbins v. Armstrong, 84 Va. 810.

The record shows that Beecher purchased the Riverside farm by deed April 17, 1879, which makes no allusion to or recognition of the wife, or of her having any claim or separate estate; that he took the title in his own name; that he used it as his own exclusive and absolute property; that he sold and conveyed parts of it, and twice conveyed the whole of it by deeds of trust to secure his debts contracted upon the faith of it, and that he took the releases to himself; that he held it and used it, and obtained credit upon it as his own for over six years, without ever a suggestion of his wife's interest, until by deed, April 21, 1885, (when he had become heavily indebted,) he settles it, and all his other property, upon his wife, to the exclusion of his creditors, upon the recital in the said deed of settlement—the first intimation—that he had received and appropriated money belonging to his wife at various times previously,—part in 1875, and part in 1883, and other parts at different times,—some of which went to the support of the family, some into the partnership business, and some was used to make the last payments of the purchase money for the Riverside farm, and for improvements put thereon. But there is no adequate proof, if indeed, there be any whatever, of a contract to repay these moneys. No such contract appears anywhere, in the deeds touching this land, between the parties, and the only suggestion in the evidence of any such contract, or any contract at all, is in the deposition of the trustee, O. Beecher, Jr., "that there was no understanding at the time they were made directly to her, but it was always agreed that the property should be hers. This was the understanding at the time of the purchase, though nothing was said about it." Proof of such a contract must be distinct, full, and conclusive to support the settlement; and there is not even a claim or assertion anywhere in the record that the alleged contract or agreement was in writing. The witness, O. Beecher, Jr., trustee, is seriously impugned, by evidence in the record, for want of veracity;

but, taking his incomprehensible statement above quoted, for true, it not only falls far short of proving a specific agreement, at the time, that the Riverside farm purchased should be the property of the wife, but it can not be construed into a binding contract, as testified to by this witness, in regard to land, without an utter disregard of the policy and the letter of the statute of frauds. Blow v. Maynard, 2 Leigh (Va.), 30. By the evidence of appellants' own witnesses and their own pleadings, Mrs. Beecher permitted her money to go into the hands of her husband, O. Beecher, and be used in his business, and be mixed with his property, and to be applied to the purchase of land in his own name, and to be held and used to give him credit and advantage in his business, for a series of years; and by so doing it became his own property, and liable for his debts. Kesner v. Trigg, 98 U. S. 50; Humes v. Scruggs, 94 U. S. 27. Having constantly consented that he should hold himself out to the world as the absolute owner of this property, and to contract debts on the credit of it up to the very hour of his insolvency, it would be against the plainest principles of justice and good conscience, and utterly subversive of fair dealing, to permit the wife to step in at the last moment, and after many years, with an unsupported and mere assertion of ownership of the property which she had permitted him to hold and proclaim as his absolute own all the time, and obtain and enjoy credit and business standing thereby, and thus to defraud the just debts due to his honest creditors. When the trust does not arise upon the face of the deed, but is raised upon the subsequent payments of the purchase money to override the deed, the proof must be very clear, and mere parol evidence ought to be received with great caution. Bank v. Carrington, 7 Leigh (Va.) 581. And if every word, as testified to by the witnesses for the appellants, be true as to the sum of money belonging to Mrs. Beecher alleged to have been paid by her husband upon the purchase of the Riverside farm, this would not support a resulting trust. The trust must be coeval with the deed, or it cannot exist. "A resulting trust must arise at the time of the execution of the conveyance. A subsequent payment will not, by relation, attach a trust to the original purchaser." Miller v. Blose, 30 Grat. (Va.) 744. In Bispham's Principles of Equity it is said: "It is essential to a resulting trust that the money should be paid at the time of the purchase. A subsequent payment cannot raise a trust." In Biglow, Fraud, 109, it is said: "After the legal title has been conveyed to

one who agreed to buy for another, the application of the latter's money to pay notes for the purchase money creates no resulting trust in favor of the other. The trust must attach, if ever, at the time of the conveyance," etc.

The simple fact that the husband used the wife's money, as alleged, is not a sufficient consideration to support the deed of settlement, in the absence of proof that, at the time and times the various sums of money were received from the wife it was understood to be loaned, and that then and subsequently both husband and wife recognized it as a debt, and intended to stand to each other in the relation of debtor and creditor. Bump, Fraud, Conv. 304; College v. Powell, 12 Grat. (Va.) 372; Blow v. Maynard, 2 Leigh (Va.) 30; Campbell v. Bowles, 30 Grat. (Va.) 663. There is no pretense of such proof in this record, and in fact it appears throughout the whole matter that this money was used by the husband by common consent as his own, and never was thought of as a debt from him to his wife till subsequent events made it necessary to hide his property from his creditors. The presumption is that when a wife's money comes into the hands of her husband, and is used by him in his business as his own, and to purchase property in his own name, and hold it and use it, and trade with the property so bought and held, in his own name, and contract debts upon the faith and credit of his recorded legal title, it is his own property, and she cannot, after years have passed, claim it as her own, and thus enable a husband to consumate a fraud upon his creditors. Humes v. Scruggs, 94 U. S. 22. The presumption is that she intended to give, and not to loan, the money, even if (as in this case there is not) there be any proof that the moneys did not belong to the husband by his marital right, and that she held any separate estate. 2 Minor, Inst. 192; Miller v. Blose, 30 Grat. (Va.) 744; Irvine v. Greever, 32 Grat. (Va.) 411.

The married woman's act secured to married women property "hereafter acquired,"—that is, after April 4, 1877; and all the money appropriated by the husband was acquired by the wife long prior to April 4, 1877,—in 1863 and 1875. And the married woman's act does not prevent a wife from giving her property to her husband, if she please; nor does it abrogate the presumption that, under circumstances such as obtained in this case, she has done so. Bain v. Buff, 76 Va. 374.

The decree complained of is plainly right, and we are of opinion that it must be affirmed.

9. LIABILITY TO EACH OTHER IN TORT.

BANDFIELD v. BANDFIELD.

117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. 550. (1898.)

Action by Emma S. Bandfield against her former husband, Charles A. Bandfield, from whom she had obtained a divorce for desertion, to recover damages for the communication by him to her during coverture of a loathsome disease. Demurrer to declaration sustained. Affirmed.

GRANT, C. J.: The sole question is : Can a wife maintain suit against her husband for a personal tort, committed upon her while they were living together as husband and wife? We answered this question in the negative in the case of Wagner v. Carpenter, Circuit Judge, decided November 17, 1897. In that case the husband had uttered a gross libel against his wife. She brought suit by capias ad respondendum, and the proceedings were quashed by the circuit judge, for the reason that the wife could not maintain the suit against her husband. The wife applied to this court for the writ of mandamus to compel the circuit judge to vacate that order. The writ was denied, and the order of the circuit judge sustained. No opinion was written. But the sole and identical question there involved is the same as is involved in this suit. The briefs there filed pursued the same line of argument and cited the same authorities as are now cited. Counsel cite the married woman's act of this state as conferring this right. This act is found in 2 How. Ann. Stat. §§ 6295, 6297, which read as follows: "The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female. * * * Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried." In many decisions the courts of many of the states, notwithstanding the statutes conferring rights upon a married woman over her separate property not conferred by the common law, have thus far, without exception, denied the right of a wife to sue her husband for personal wrongs committed during coverture. No such right is conferred by our statute unless it be by implication. The legis-

lature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bac. Abr., title "Statute," I, p. 245: "In all doubtful matters, and when the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares. Therefore in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act."

The result of plaintiff's contention would be another step to destroy the sacred relation of man and wife, and to open the door to law-suits between them for every real and fancied wrong,—suits which the common law has refused on the ground of public policy. This court has gone no further than to support the wife, under the married woman's act, in protecting her in the management and control of her property. It has sustained her right to an action for assault and battery, for slander, and for alienation of her husband's affections against others than her husband. Berger v. Jacobs, 21 Mich. 215; Leonard v. Pope, 27 Mich. 145; Rice v. Rice, 104 Mich. 371, 62 N. W. 833. At the same time, it has held that the wife could not enter into a partnership or other business with her husband, and thus become responsible for the contracts and debts of her husband. Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907; Edwards v. McEnhill, 51 Mich. 160, 16 N. W. 322. Personal wrongs inflicted upon her give her the right to a decree of separation or divorce from her husband, and our statutes have given the court of chancery exclusive jurisdiction over that subject. This court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband, so far as courts can do justice, and, in providing for her, will give her such amount of her husband's property as the circumstances of both will justify, and, in so doing, may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor. 2 Am. & Eng. Enc. Law (2d ed.) 120; 2 How Ann. Stat. § 6245. In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the contrary. We cite a few sustaining the rule: Abbott v. Abbott, 67 Maine 304; Freethy v. Freethy, 42 Barb. (N. Y.),

641; Peters v. Peters, 42 Iowa, 182; Schultz v. Schultz, 89 N. Y. 644; Cooley, Torts (2d ed.), p. 268; Schouler, Dom. Rel. § 252; Newell, Defam. p. 366; Townsh. Sland. & L. (3d ed.), p. 548.

Judgment affirmed.

WIFE'S CONTRACTS FOR NECESSARIES, ETC.

1. Where Husband and Wife are Living Together.

MONTAGUE v. BENEDICT.

3 Barn. & C. 631, 10 E. C. L. 205. (1825.)

Assumpsit for jewelry sold by plaintiff to defendant's wife. The defendant was a special pleader in considerable practice. The jewelry sold amounted in price to 83 £, of which plaintiff had received from the wife 34 £ on account. The jury found for the plaintiff to the amount of his bill. A rule nisi was obtained for a nonsuit on the ground that there was no evidence to be left to the jury of the husband's assent to the purchase. Four judges delivered concurring opinions. Rule for nonsuit made absolute.

BAYLEY, J.: It seems to me, that in this case there was no evidence to go to a jury to entitle the plaintiff to a verdict. I take the rule of law to be this: if a man, without any justifiable cause, turns away his wife, he is bound by any contract she may make, for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show, that the wife has made the contract with his assent, Etherington v. Parrott, Ld. Raym. 1006. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence;

and when such assent is proved, the wife is the agent of the husband duly authorized. Then the question is, was there any evidence in this case to warrant my Lord Chief Justice in submitting, as a question for the consideration of the jury, whether the wife had the authority of the husband to make this purchase? It appears, that the wife had originally a fortune under 4000£; that would yield an income less than 200£ per annum. There was no evidence on the part of the plaintiff to show that she had a fortune even to that extent; that fact afterwards appeared upon the defendant's evidence. Then is it to be presumed, that a husband working hard for the maintenance of himself and family, keeping no man-servant, and living in a house badly furnished, would authorize his wife to lay out in the course of six weeks, half of her yearly income in trinkets? If the tradesman in this case had exercised a sound judgment, he must have perceived that this money would have been much better laid out in furniture for the house, than in decking the plaintiff's wife with useless ornaments, which would so ill correspond with the furniture in the house. I think, at all events, there was gross negligence on the part of the plaintiff, if he ever intended to make the husband responsible. If a tradesman is about to trust a married woman for what are not necessaries, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving; and if he had so inquired in this case, it is not improbable that the husband might have told him not to trust her. But no such inquiry was made; on the contrary, the plaintiff always inquired for the wife, and that is strong evidence to show that she was the person trusted, and not the husband. On the whole, I think that the plaintiff did not make out, by reasonable evidence, that the wife had any authority to make the purchase in question.. Rule absolute for a nonsuit.

WANAMAKER v. WEAVER.

176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. 621. (1903.)

Action by John Wanamaker against Simon G. Weaver to recover for goods sold to defendant's wife. Verdict for defendant. Judgment on verdict affirmed.

HAIGHT, J.: This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that, while the goods might ordinarily be deemed necessaries, they were not in fact such, for the reason that the defendant lived on a salary of $2,000 per year, out of which he delivered to his wife $1,500 in monthly installments of $125 with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled, and an exception was taken. The court, in discussing the question, stated the law to be as follows: "That if a married woman goes to a merchant, and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similer articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband can not be held responsible, unless there is some affirmative proof of actual authority outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question as to whether the plaintiff gave credit to the defendant or to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the purchase, and therefore the articles were not necessary for her support and maintenance. The majority of the judges of the Appellate Division appear to have entertained the view that if the articles purchased by the wife were of the character ordinarily deemed necessaries, such as clothing, table linen, towels, and napkins, the

merchant was at liberty to furnish her therewith, and charge her husband therefor, without regard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated: That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make inquisitorial examination, and ascertain whether the family possesses an adequate supply of the articles which the wife desires to purchase."

It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of Keller v. Phillips, 39 N. Y. 351, the husband had given the merchant notice not to give the wife further credit, and in the case of Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270, the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case.

In the case of Cromwell v. Benjamin, 41 Barb. (N. Y.) 558, the General Term sustained the right of a merchant to recover of the defendant for the necessaries furnished to his wife. J. C. Smith, J., in delivering the opinion, states the law, as he understood it, as follows: "But the husband may be liable for necessaries furnished to the wife in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessaries to the wife so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessaries himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessaries."

In Bloomingdale v. Brinkerhoff, 2 Misc. (N. Y.) 49, 20 N. Y. S. 858, it was held that, in order to entitle the tradesman to recover from the husband, it was incumbent upon him to show that "the articles supplied to the wife were not

only of the kind usually denominated necessaries, because their need is common to all persons, but that, in consequence of the inadequacy of the husband's provision, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states bearing upon the liability of the husband for necessaries, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases in England where the question appears to have been more thoroughly considered in the higher courts. [The court here reviews the cases of Debenham v. Mellon, 5 Q. B. Div. 394; 6 Appeal Cases 24, and Morel Brothers v. Earl of Westmoreland, 1 K. B. (1903) 64, and, after citing other authorities, continues].

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor; that the question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a proper case, and at the same time affords him some financial protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need.

We do not participate in the alarm which appears to have possessed the learned justices of the Appellate Division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied authority on the

part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. The judgment of the Appellate Division should, therefore, be reversed, and that entered upon the verdict affirmed, with costs.

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2. WHERE HUSBAND AND WIFE ARE LIVING APART.

SIBLEY v. GILMER.

124 N. Car, 631, 32 S. E. 964. (1899.)

Action against a husband for goods sold to his wife. Judgment for defendant. Reversed.

MONTGOMERY, J.: The only question presented in this case is: Is the husband liable for the price of goods (ladies' apparel) not necessaries, sold to his wife, after separation, by one who had, previous to the separation, sold to her, on credit, at various times, goods which were afterwards paid for by the husband; the seller having been ignorant of the separation at the time of the last sale? What constitutes "necessaries," and what are the nature and extent of the husband's liability for "necessaries" furnished to his wife, either while they are living together or living apart, though discussed at length on the argument here, are not matters necessary to be considered by the court. In the case on appeal it appears that the plaintiffs on the trial below abandoned the count for necessaries, and relied upon the agency of the wife. His honor instructed the jury that, if they believed the evidence, to answer the issue, "Is the defendant indebted to the plaintiffs, and, if so, in what sum?" "Nothing."

The defendant's wife had, before their separation, bought goods from the plaintiffs in New York City, and they had sent out monthly statements of account therefor to the defendant at his home in Greensboro, N. Car. He never made objection to the course of his wife, and the husband paid some of the bills by his personal checks. After the separation, the plaintiffs sold other goods to the defendant's wife, the price of which this action was brought to recover, the plaintiffs having no notice of the separation, although it was known generally in North Carolina, and at Greensboro, where the defendant resided.

A husband can make his wife his agent, and he will be bound for her acts by the same rules of law as would preail in the case of any other agency, and the agency may be express or implied, as in other cases. Schouler, Dom. Rel. § 72; Story, Ag. § 7; Mechem, Ag. § 62; Webster v. Laws, 89 N. Car. 224. That being the true statement of the law, we are of the opinion that upon the facts in this case the instruction of his honor was erroneous. The matter is one entirely of agency in general, and the agency growing out of the relation of husband and wife by operation of law is not the question involved.

The defendant, by his course of acquiescence in the dealings between the plaintiffs and his wife, and by his payment of the accounts, held his wife out to the plaintiffs as empowered and authorized by him to make purchases of goods from them, and such an agency by implication is as binding as if he had expressly authorized her to buy the goods on his account. The implied agency having thus been established, the plaintiffs had a right to presume that the authority would be continued until they had reason to know that it had been discontinued. Cowell v. Phillips (R. I.), 20 Atl. 933; Story, Ag. § 470; 1 Am. & Eng. Enc. Law, p. 1230, and cases there cited.

The main contentions of the defendant were: First, that the purchase of the goods on credit was the contract of the wife herself, and therefore void, and, as a corollary, that the defendant husband could not ratify a contract void and against public policy; second, that the wife's implied authority from the husband to purchase the goods from the plaintiffs, if it ever existed, was revoked by the separation, by force of law, as in case of the death of a principal; and, third, that if there ever existed an implied agency between the defendant and his wife, the plaintiffs had notice of its revocation by reason of the fact that the separation was generally known in Greensboro, where the defendant resided.

We think that, although the goods were charged on the books of the plaintiffs to the wife, the whole transaction showed that the credit was extended to the defendant; and the manner in which they were charged could not affect his liability, especially as monthly statements of the account were sent to the defendant, some of which he paid by his personal checks, without even a word of objection or protest to the purchases by his wife. In support of the second mentioned contention of the defendant his counsel cited the case of Pool v. Everton, 50 N. Car. 241. In that case the

husband and the wife were living apart, and the plaintiff, a physician, attended her in a case of sickness. A public notice by advertisement had been given by the husband of the separation, and that he would not be liable for her debts, and the plaintiff was aware of such notice having been given at the time he rendered the service. The court held there that the plaintiff could not recover on the ground that he had not shown that the wife had good cause of separation. The question there was not one of general agency, but one of operation of law; i. e. the liability of the husband for necessaries, the husband and the wife living apart. The court said, among other things, that a married woman could make a contract for her husband that would bind him, and that the agency might be constituted either by express authority or by implication. The defendant's reliance is upon the following language used by the court in that case: "But this implication of agency can only be made while the parties continue to live together. If they separate, and live apart, the idea of an implied agency is out of the question. The effect of the notice [such as was given in this case] is merely to inform the public of the fact of the separation, which operates as a revocation of any implied agency that existed while they lived together."

The language of the eminent judge who wrote the opinion in that case may not convey as clear a meaning as usually characterized his opinions, but we think the reasonable construction of his words must be that, in cases where husband and wife had separated, no notice of separation need be given to prevent his liability for debts contracted by the wife during the separation,—even for necessaries; the law being that, if the separation was without good cause on the part of the wife, her debt contracted, even for necessaries, was not only not binding on the husband, but such creditors made themselves liable to the husband in an action for damages for extending such credit. And we think that, while there may be some confusion about the language in the last sentence of the extract from that opinion, the meaning was that the notice given in that case could only affect such creditors as had been, before the separation, dealing with the wife as agent by implication of the husband in respect to matters not strictly to be classed as necessaries for the support of the family. We think the court had in mind just such agencies as the one we are treating in this case as the ones to be affected by the notice. There was error in the instruction given by his honor and there must be a new trial.

Douglas, J., dissents.

CUNNINGHAM v. REARDON.

98 Mass. 538, 96 Am. Dec. 670. (1868.)

Action to recover for board and lodging furnished by plaintiff to defendant's wife, and for money paid by him for her funeral expenses. The defendant's wife, who was ill with consumption, was forced by his cruelty to leave him. Thereupon the plaintiff supplied her with board and lodging from June, 1864, until her death in September, 1864. The husband was able to provide for her, but after she left him, he never visited her nor solicited her to return. Plaintiff provided and paid for a suitable burial of the wife at reasonable expense, but without notifying the husband of her death. The defendant admitted his liability for the board and lodging, but denied that there was any promise implied by law that he should reimburse the plaintiff for the voluntary payment for funeral expenses. Judgment for plaintiff for the full amount claimed.

HOAR, J.: The husband who by his cruelty compels his wife to leave him is considered by the law as giving her thereby a credit to procure necessaries on his account; and is responsible to any person who may furnish her with them. This responsibility extends not only to supplies furnished her while living, but to decent burial when dead. Its origin is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, and which he neglects or refuses to do for himself; and is applicable as well to supplies furnished to the wife when she is sick, insensible or insane, and to the care of her lifeless remains, as to contracts expressly made by her.

Nor is any notice to him requisite, in order to charge him for her funeral expenses, any more than for necessaries to sustain life. The burden is on the plaintiff in either case to prove the existence of the necessity, and that the husband has failed to make provision for it. But when this is established, nothing more is needed to create the liability; and it would

seem to be an idle ceremony to give notice of his wife's death to a man who had refused her the means of sustaining life. The responsibility for funeral expenses is not a new and distinct cause of action, differing in kind, or in the rules by which it is created; but an incident to the obligation to furnish bodily support. Judgment for the plaintiff for the full amount claimed.

KIRK v. CHINSTRAND.

85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333. (1901.)

Action by Sophia Kirk against James Chinstrand to recover for necessaries furnished defendant's wife. Judgment for plaintiff. Affirmed.

BROWN, J.: This was an action to recover for necessaries furnished by plaintiff to and for the wife of defendant. Plaintiff had judgment in the court below, and defendant appealed. The cause was tried in the court below without a jury, and the facts were found substantially as follows: Defendant and Mary Chinstrand are husband and wife, and have been such for the past 25 years. Some time in March, 1898, the wife, who was then residing with defendant, left his residence for some cause not disclosed, and went to the state of Iowa, returning therefrom in the latter part of the same year; but the parties have never since that time lived together as husband and wife. After her return from Iowa she boarded for a time at the same house with her husband, but since April 1, 1899, they have lived wholly separate and apart from each other.

On April 1st defendant procured a boarding place for himself, but refused to permit his wife to accompany him, and has since made no pecuniary allowance or provision for her support, other than engaging with one Stilly to board and provide her with a room at his home. The place so provided was a suitable and proper place for the wife, but for some reason not disclosed (the wife was not permitted to testify on the trial) she declined to accept it, and made independent arrangements with plaintiff for her support. Defendant informed plaintiff after his wife had taken up her abode with her that he would not be responsible for or pay any indebtedness in-

curred by the wife. The court found, as conclusions of law, that it was the duty of the husband to support the wife, and that it was immaterial that she did not accept his offer to support her at the home of Stilly.

A large number of assignments of error are presented, but we fail to discover reversible error in any of them. Some of them refer to the refusal of the trial court to make additional findings of fact; but the additional findings, if made, would not change the legal relations or affect the liability of defendant, and were properly refused. It is claimed that at the time the wife left for the state of Iowa she took with her certain personal property belonging to her husband. The court sustained an objection to an admission of testimony of this character, and the ruling is assigned as error. We are unable to understand why this fact, if it be conceded to be a fact, is in any way material.

It was defendant's duty to provide for the support and maintenance of his wife and the mere fact that he had some trouble or difficulty with her which resulted in their separation in no way relieved him from that responsibility. The court expressly found that the defendant refused to permit his wife to live with him. It was wholly immaterial, in view of that finding, which is sustained by the evidence, whether she offered to live with him after returning from Iowa or not. Even if it be conceded that the wife voluntarily abandoned and deserted the husband,—she having returned to him, and he having refused to receive her,—the liability to support her was revived, if it was suspended during the period of desertion; and, if he refuses to furnish her a home with himself, she may secure necessaries of life elsewhere, and he is liable, under the law, therefor.

The wife is not required, where the husband refuses to permit her to live with him, to submit to his dictates as to where she shall live. She may go where she pleases, so long as the place selected by her is respectable, and the expense thereof does not exceed proper limits, taking into consideration the financial circumstances of the husband. The rule in such cases is that the husband, by refusing to permit the wife to live with him and turning her away, sends credit with her to the extent of her necessaries. Bevier v. Galloway, 71 Ill. 519.

We have examined the record with care, and all the assignments of error made by appellant, and conclude that the result reached by the trial court was in harmony with the law, and the judgment appealed from is affirmed.

VUSLER v. COX.

53 N. J. L. 516, 22 Atl. 347. (1891.)

Suit by Dr. Henry M. Cox against the executors of George Vusler, deceased, to recover for professional services rendered decedent's wife. At the time the services were rendered the wife was not living with decedent, having left him without legal excuse. Judgment for plaintiff. Reversed.

DEPUE, J. (after stating the facts): It may be inferred from the case certified, and will be assumed that the plaintiff rendered these services to the testator's wife without knowledge that she was living in a state of separation from her husband. The liability of a husband on a contract made by the wife is usually ascribed to those principles which are applicable to the relation of principal and agent.

Where husband and wife are living together, the wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and for articles furnished to her for her personal use suitable to the style in which the husband chooses to live. Under such circumstances, the presumption is in favor of the wife's authority to contract on behalf of her husband. 1 Evans, Ag. 166; Wilson v. Herbert, 41 N. J. Law, 454; Jolly v. Reese, 15 C. B. (N. S.) 628; 3 Smith, Lead. Cas. (9th ed.) 1757, notes to Manby v. Scott.

But, where the husband and wife are living in a state of separation, the presumption is against the authority of the wife to bind the husband by her contract. Under such circumstances, the general rule is that the husband is not liable. To this rule there are two exceptions pertinent to this inquiry, the first of which is, where a husband and wife separate and live in a state of separation by mutual consent, without any provision for her maintenance or means of her own for her support; the other, where the wife leaves her husband under the stress of his misconduct of such a character as in law is regarded as a justifiable cause for the wife's quitting her husband's society. In such cases, the presumption being against the liability of the husband for the wife's contract, the burden of proof is upon the party seeking to enforce against him a liability for her contract. He must show affirmatively the special circumstances

which shall fix the responsibility on the husband in order to establish his cause of action. Mainwaring v. Leslie, 1 Moody & M. 18; Johnston v. Sumner, 3 Hurl. & N. 261-268; Blowers v. Sturtevant, 4 Denio, 46; Breinig v. Meitzler, 23 Pa. St. 156; Snover v. Blair, 25 N. J. Law, 94; 2 Kent Comm. 147. The cases, English and American, on this subject, are collected in the American editions of Smith's Leading Cases, under the head of Manby v. Scott, supra.

The certificate of the court of common pleas states that it did not appear that the wife had any reason for leaving her husband, and the facts set out in the certificate tend to show that she left of her own volition, and without any justifiable cause. Nor will the fact that the plaintiff had no knowledge that the wife was living separate from her husband avail to relieve the plaintiff from the burden of proof. Independently of agency, express or implied, from cohabitation, the liability of the husband upon contracts made by the wife, pledging his credit, arises from the acts or misconduct of the husband. As was said by Lord Selborne, there is no mandate in law, from the fact of marriage only, making the wife the agent in law of her husband to bind him and pledge his credit, except in the particular case of necessity,—a necessity which may arise where the husband has deserted the wife, or has by his conduct compelled her to live apart from him. Debenham v. Mellon, L. R. 6 App. Cas. 24-31. On any other hypothesis, a wife living separate from her husband without justifiable cause, or even through her own misconduct, would have it in her power to pledge his credit by seeking persons with whom to deal who were unaware of the family relations.

There being no proof of facts from which agency might be implied, and from the fact that the wife was living apart from her husband, the presumption being that she had no authority to bind the husband, the plaintiff could make no case against the husband except on proof of those particular circumstances from which the husband's liability would result as a mandate in law. To make out a cause of action against the husband, the plaintiff was bound to prove those special circumstances from which alone the husband's liability for the plaintiff's demands would result. Without such proof, he had no case. Upon the case as certified, the court of common pleas gave judgment for the plaintiff. That judgment was erroneous, and should be reversed.

COWELL v. PHILLIPS.

17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182. (1890.)

Action by Anthony Cowell and others against Charles W. Phillips for goods sold defendant's wife. Verdict for plaintiffs. Petition for new trial dismissed.

STINESS, J.: The plaintiffs sold and delivered the furniture sued for to the defendant's wife upon her order, and charged the bill to the defendant. They had previously made similar sales upon her order, and the defendant had paid the bills without objection. Upon one occasion, the defendant had accompanied his wife to the plaintiff's store, when a bill of goods was purchased, but at other times she was alone.

At the time of the last sale, the defendant and his wife had separated, and these goods were sent to the house where the wife was living apart from her husband, having left him, so far as appears, without justifiable cause. The plaintiff did not know of the separation. The defendant requested the court below to instruct the jury as follows: "If the husband provided a suitable home, according to his means, for his wife, and she voluntarily left the same, without fault on his part, he was not liable for debts contracted by her while living apart from her husband, by reason of his being her husband, even though he had paid for goods ordered by the wife and delivered at their home while living together, whether the persons dealing with her had notice of the separation or not."

The court instructed the jury that, if a woman lives apart from her husband by her own wrong, the husband is discharged from supporting her; but when a tradesman furnishes goods to a wife after separation, the husband having previously paid for goods furnished to her, the tradesman not knowing of the separation, and not having reasonable cause to know it, the agency may be presumed to continue until knowledge is brought home to the tradesman. Exception was taken to this instruction. We think the instruction as given was correct.

A married woman may bind her husband for goods bought by her in two ways: For necessaries, by reason of his obligation to support her, when he omits or refuses to provide them under circumstances which make it his duty so to do; and for other things, when she acts as his agent, under his authority, express or implied. In the former case she may bind him without, or even against, his personal authority, by what is termed "her agency in law." In the latter case she can bind him only in the way that any person may bind another, by an agency in fact.

The request made in this case related only to the marital obligation, and instruction was given substantially as requested. If the husband provided a suitable home for his wife, which she voluntarily left, without fault on his part, it is clear that he would not be liable for goods furnished to her while away, by reason of the fact of marriage. Debenham v. Mellon, L. R. 6 App. Cas. 24. The portion of the instruction excepted to covered the liability of the husband, by reason of the agency of the wife.

The only question in this case, therefore, is whether the plaintiffs might presume that the agency, evidenced by previous dealing, continued until they knew or had reason to know of the separation or of a revocation of the agency. This question relates to the law of agency, rather than to the relation of husband and wife. The liability of the husband in case of such agency was settled on the case of Manby v. Scott, 1 Sid. 109, 120, by the third resolution agreed to by the judges (2 Smith, Lead. Cas., Hare & W. Notes, *418), as follows: "If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his assumpsit in law, yet on his assumpsit in fact, whether the goods are for himself, or for his children, or for his family; all which positions are so obvious that they require no demonstration." If, then, the husband has held the wife out as his agent, by previous dealings, the person has the right to presume that the authority continues until he has reason to know to the contrary. This is the well-established rule in cases of agency. See Story, Ag. § 470, and note; 1 Amer. & Eng. Enc. Law, 448, and cases cited. A familiar illustration of this rule is found in the case of a retiring partner. This was the substance of the instruction given to the jury, and it was therefore correct. Mickelberry v. Harvey, 58 Ind. 523; M'George v. Egan, 5 Bing. N. C. 196; Reid v. Teakle, 13 C. B. 627; Benjamin v. Benjamin, 15 Conn. 347; Cany v. Patton, 2 Ashm. 140.

Petition dismissed.

STEINFIELD v. GIRRARD.

103 Maine 151, 68 Atl. 630. (1907.)

Action by H. L. Steinfield against Henry Girrard to recover for merchandise furnished to defendant's wife. Verdict for plaintiff for $18.08. Defendant excepted to certain rulings of the trial justice. Exceptions sustained.

KING, J.: Action of assumpsit to recover the price of certain merchandise furnished to the wife of defendant.

Verdict for plaintiff. The case is before the law court on defendant's exceptions to the exclusion of testimony and certain instructions of the presiding justice.

It appeared in evidence that the wife had never before bought any goods of plaintiff on defendant's credit, that she had not been living with her husband for some few months prior to the purchase, but that the plaintiff was ignorant of the separation.

The defendant offered his own testimony to the effect that he was always willing and prepared to provide a home, and all necessaries, for his wife, and that she was living apart from him on the date of the purchase of the goods sued for, without fault on his part. This testimony was excluded for the reason, as stated by the presiding justice, that, unless the plaintiff knew of the separation, the testimony offered would be immaterial. To that ruling the defendant excepted. We think that the exception must be sustained.

It was incumbent upon the plaintiff to establish the authority of the wife to bind the husband by the purchase of the goods. The only evidence relied upon for this purpose was the fact of marriage. It may be doubtful, if there is any presumption of agency on the part of the wife to pledge her husband's credit for necessaries arising from the marriage contract alone, independent of the conjugal relation and cohabitation; but, if there is any such presumption, it is rebuttable, and may be disproved by the husband. Baker v. Carter, 83 Maine 132, 21 Atl. 834, 23 Am. St. 764.

The authority of a wife to pledge her husband's credit for necessaries arising from the marital relation alone is only coexistent, and coextensive with her necessity occasioned by his failure to fulfill his duty in this respect. If his duty has been performed, or no longer continues, then no necessity can legally arise which would entitle the wife to such authority.

When a wife deserts her husband, without his fault, she forfeits all right to support and maintenance from him, and, a fortiori, in such case, she carries with her no authority to use his credit, even for necessaries. Peaks v. Mayhew, 94 Maine 571, 48 Atl. 172.

The testimony offered in the case at bar was to the effect that the wife had in fact forfeited her right to support from the defendant by a wilful violation of marital duty, a separation from him without his fault, and that he was willing and prepared to provide a home and all necessaries for her. If true it would have established affirmatively a complete defense to

the action. The defendant had a right to make this defense irrespectitve of the plaintiff's lack of knowledge of the separation.

The testimony offered should have been admitted. Its exclusion was prejudicial to the defendant, depriving him of the right to present facts which would disprove any liability on his part under the action. For that reason this exception must be sustained, and a new trial granted.

The conclusion which we have reached that a new trial must be granted on account of the exclusion of the testimony offered by the defendant renders unnecessary a consideration of the other exceptions.

Exceptions sustained.

KIMBALL v. KEYES.

11 Wend. (N. Y.) 33. (1833.)

Kimball sued Keyes in a justice's court for goods sold and delivered to a daughter of defendant who lived with her mother, defendant's wife. Defendant and wife were living apart, but he had made reasonable provision for her support. The other facts appear in the opinion. Judgment for plaintiff for $24.84. This judgment was reversed by the court of common pleas and the plaintiff sued a writ of error to the Supreme Court. Judgment of court of pleas affirmed.

SUTHERLAND, J.: The court of common pleas properly held, that upon the evidence in this case, the defendant was not responsible for the goods sold by the plaintiff to the wife and daughter of the defendant. The defendant living separate from his family, was undoubtedly bound to furnish them with necessaries suitable to their condition, and his omission to do so, would furnish them with a general credit to that extent; but he has no right to supply them in such reasonable manner as he may think proper; he can employ such mechanics and store keepers as he chooses, and can prohibit all others from giving them credit on his account. That seems to have been the fact in this case. Mr. Wood, the son-in-law of the defendant, testified that he kept a drygoods and grocery store, and that the defendant had made an arrangement with him to furnish his family with all the necessaries in his line which they required, which he had accordingly done; that he had made similar ar-

rangements with butchers and others; that he sent a man frequently to see that they were properly taken care of, and that the defendant had always provided comfortably for them. It was shown that these arrangements were well known to the defendant's wife, and that the defendant had given public notice, in a newspaper which the plaintiff took, prohibiting all persons from trusting his family without his special orders, and that they had previously had no dealings with the plaintiff. Under such circumstances, the defendant can not be held responsible. 2 Kent's Comm. 124, 5, 6; 11 Johns. (N. Y.) 281; 2 Strange, 875, 1214, and other cases cited by Ch. Kent.

Judgment affirmed.

BAKER v. BARNEY.

8 Johns. (N. Y.) 72, 5 Am. Dec. 326. (1811.)

Assumpsit by Barney for $11.97 for goods sold to Baker's wife. Baker and wife had separated by mutual consent several weeks before the delivery of the goods to her, and plaintiff's clerk testified that it was commonly reported that the two were not living together. It was orally agreed at the time of the separation that Baker was to give his wife one thousand dollars, but there was no evidence of any payment by him to her. Judgment for plaintiff. Affirmed.

BY COURT: If the husband and wife part by consent, and he secures to her a separate maintenance suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessaries; and the general reputation of the separation will in that case be sufficient. It was so ruled by Holt, C. J., in Todd v. Stokes, 1 Salk. 116; and this general doctrine seems to have been conceded in Nurse v. Craig, 5 Bos. & P. 148, in which case all the authorities are carefully reviewed, and the extent of the husband's responsibility, when he and his wife part by consent, fully and ably discussed. The court in that case laid great stress upon the circumstance of the due security and punctual payment of the pecuniary maintenance allowed to the wife. In the present case the husband and wife parted by consent a few weeks prior to the sale of the goods, but the contract was not reduced to writing until the spring following; and there was no evidence of payment of any part of the sum agreed to be given to

the wife. The whole rested in a naked promise without validity, and if the husband was from that time to be discharged from responsibility for necessaries, the wife might have been left to subsist on charity. The goods taken up in this case can not be considered as unreasonable or improper; and the defense below failed from the want of showing, that at the time of the sale of the goods the allowance was punctually paid or secured according to the agreement.

The judgment must therefore be affirmed.

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3. WHERE CREDIT WAS GIVEN TO WIFE PERSONALLY.

MITCHELL v. TREANOR.

11 Ga. 324, 56 Am. Dec. 421. (1852.)

Action of assumpsit. Verdict and judgment for plaintiff. Reversed.

LUMPKIN, J.; This was an action of assumpsit, brought by John Treanor against John J. Mitchell, to recover the value of a bill of goods furnished by the plaintiff to the wife of the defendant. The facts, as agreed upon by the parties, are these: The merchandise charged in the account was purchased by Mrs. Mitchell in the year 1849, commencing on the third of February and ending on the twenty-seventh of December of that year; she, during the whole of that time, living separate from her husband; having been constrained, by family disagreements and unkindness, to leave his house and live apart from him, with her infant child seven years old. The articles were charged in the original book of entries to the wife, and not to the husband. It appeared, also, that during the year 1849 Dr. Mitchell gave an order to some third person, addressed to Treanor, desiring him to supply the bearer with six yards of homespun, which the plaintiff refused to purchase, saying that Mitchell, the defendant had no account with him.

Dr. Mitchell was then, and is now, in possession of some thirteen slaves and other property; and the things bought were suitable to his circumstances and condition in life. At the

time of the separation, no provision was made for the wife. Subsequently, to wit, in February, 1850, a partial divorce was granted to her; and by the verdict of the jury, an allowance for past maintenance was decreed by the jury. Upon this testimony, is the husband liable for the debt?

As cohabitation is presumptive evidence of the wife's authority to contract, it is for the husband to rebut that presumption, by showing that the goods were supplied under such circumstances that he is not bound to pay for them; but where the husband and wife are living apart, the onus lies the other way, and it is for the tradesman to show that the separation has taken place under such circumstances as will render the husband liable. 2 Bright on Husband and Wife, 11, 12.

We think the proof that the wife was constrained to leave the house of the husband on account of mistreatment is sufficient to make him chargeable for her maintenance. She was ejected from his domicile with a letter of credit for necessaries.

Neither is he relieved from liability by the subsequent provision made by the court and jury for past alimony, the goods having been previously delivered.

But did Mr. Treanor deal with Mrs. Mitchell on the credit of the defendant, her husband? If he did not, then the husband is not answerable.

Chancellor Kent lays down the rule explicitly, that if the tradesman furnishes the goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time living with him. 2 Kent's Com. 146. A fortiori is he not liable if they were living apart?

Mr. Bright says the husband has been held not to be liable where the dealing with the wife took place on the credit of another; and where the tradesman made out the invoice and accounts to the wife, and drew bills of exchange for her to accept: 2 Bright on Husband and Wife, 18. Clancy maintains the same doctrine: Treatise on Husband and Wife, 25, 26.

The principle thus stated is fully sustained by all the reported cases. See Holt v. Brien, 4 Barn. & Ald. 252; Montague v. Benedict, 3 Barn. & Cress. 631; S. C., sub. nom. Montague v. Baron, 5 Dow. & Ry. 532; Harvey v. Norton, 4 Jur. 42; Freestone v. Butcher, 9 Car. & P. 647; Metcalfe v. Shaw, 3 Camp. 22; Bentley v. Griffin, 5 Taunt. 356.

In Metcalfe v. Shaw, supra, Lord Ellenborough declared that it was a plain ground, that if the goods were not supplied on the credit of the husband, he was not liable. On a writ of

error to reverse a judgment of the king's bench, it was decided in the exchequer chamber, that assumpsit against the husband for money lent to the wife, at the request of the wife, was not maintainable; because it appeared on the record that the contract was made with the wife, and the credit given to her, and not to the husband. Stone v. Macnair, in error, 7 Taunt. 432; S. C., 4 Price, 48. Being satisfied then, that the general liability of the husband is repelled by the proof which goes to show that the credit was given to the wife, and that the plaintiff looked to her alone for payment, the cause must be sent down for another trial.

Whether a tradesman who furnishes goods to a wife gives credit to her or her husband, is a question of fact to be determined by the jury.

GAFFORD v. DUNHAM.

111 Ala. 551, 20 So. 346. (1896.)

Action against a husband and wife for goods sold to the wife. Judgment in favor of the wife and against the husband. Judgment against husband reversed.

COLEMAN, J.: F. W. Dunham sued the appellant, F. H. Gafford, and his wife, M. B. Gafford, upon an account for groceries and supplies alleged to have been sold by one Boggan, the assignor of plaintiff. The uncontroverted evidence shows that the articles were sold to, and upon the sole credit of, M. B. Gafford. The contract for their purchase was made with her only, and all payments which had been credited upon the account were made by her. The articles were charged to her, and the name of F. H. Gafford nowhere appears upon the books of account, nor is it pretended that at any time was he regarded as the debtor. After hearing the evidence, the court, without the intervention of a jury, rendered judgment in favor of M. B. Gafford, and against the husband, F. H. Gafford, who prosecutes the present appeal. At the trial, the wife interposed the plea of coverture, and the failure of the husband to give his assent in writing to the contract. This plea was fully sustained by the evidence. We presume the court rendered judgment against the husband, upon the ground that as the contract made with the wife was void, and as the evidence showed that the articles purchased were necessaries of life, and suit-

able to the degree and station in life of the wife of F. H. Gafford, his common-law liability arose, and he was chargeable for such necessaries furnished to her.

Considered with reference to the evidence as to the furnishing of the articles to the wife, or as to the common-law liability of the husband for necessaries furnished to the wife, the conclusion of the court was erroneous. The common-law liability of the husband for necessaries and suitable comforts has always rested upon the assumption that credit was given to the husband, and not to the wife, and that the purchase was made with his implied assent. In no case did this liability arise when the facts showed affirmatively that credit was given to the wife, and charged to her, and not to the husband, and the goods were sold not upon his implied assent that they were to be charged to him. Hughes v. Chadwick, 6 Ala. 651; Pearson v. Darrington, 32 Ala. 231; O'Connor v. Chamberlain, 59 Ala. 431; Gayle v. Marshall, 70 Ala. 522.

The evidence also is satisfactory that the goods sued for were furnished to some one during the absence of both husband and wife from home, and that neither ever received or used the articles constituting the account. The fact that M. B. Gafford had authorized her cook to order groceries from Boggan for the use of the family, to be charged to her, in no event would impose a liability at common law upon the husband, upon the order of the cook given to the merchant during the absence of both husband and wife. Strauss v. Glass, 108 Ala. 546, 18 So. 526, and sections of the Code construed in the opinion. The judgment is reversed, and a judgment will be here rendered in favor of the appellant. Reversed and rendered.

FEINER v. BOYNTON.

73 N. J. L. 136, 62 Atl. 420. (1905.)

Action by Elizabeth Feiner and others against Harriet G. Boynton for goods furnished. Judgment for plaintiffs. Reversed.

GARRETSON, J.: The plaintiffs recovered a judgment against the defendant in a district court for the value of goods furnished. The defendant is, and at the time the goods were furnished was, a married woman living with her husband.

The goods furnished were for the personal use of the defendant. It appears from the state of the case that the husband provided the defendant with money from time to time for her household and personal expenses; that the account with the plaintiffs had always been in the defendant's name; that the defendant paid the bills, of which there were a large number, during the eleven years through which the account had been running, with her own checks, drawn upon a bank where her husband had deposited money for her, of which deposit the plaintiffs had no knowledge at all; that the plaintiffs had never had any dealings with her husband; that the husband deposited various sums of money, ranging from $300 to $700, in the People's Bank of East Orange, and that the defendant drew her own checks against said account to pay for the various household expenses, as well as for her clothing; that she had a separate estate.

There is no evidence to show that the defendant ever made any express contract with the plaintiff which would bind her separate estate, and the only evidence from which a contract could be inferred was that the goods were charged to the defendant on the plaintiff's books, and that the defendant paid the bills with her own checks; but there is nothing to show that the defendant knew that the goods were being charged to her by the plaintiffs, and the checks she gave in payment were of her husband's moneys, which had been deposited by her husband to pay for household expenses and clothing.

A debt incurred for the necessary clothing of a married woman is presumably the debt of the husband, and, if incurred by the wife, it is presumed she is acting as the agent of her husband, unless there is affirmative evidence to show that she intended to charge her separate estate. In Wilson v. Herbert, 41 N. J. L. 461, 32 Am. Rep. 243, it is held: "When husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent of her husband, and regards him as the principal debtor. She may contract for such articles as principal, and assume the responsibility of a principal debtor. But, to fix upon her a liability, it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of her husband."

The judgment of the district court is reversed.

DIVORCE.

1. GROUNDS FOR DIVORCE—LEGISLATIVE POWER OVER IN GENERAL.

HICKMAN v. HICKMAN.

1 Wash. 257, 24 Pac. 445, 22 Am. St. 148. (1890.)

SCOTT, J.: Appellant brought this suit in the Superior Court of Jefferson County, to obtain a divorce upon the ground of incurable chronic mania or dementia of the defendant, existing for more than ten years prior to the commencement of the action. The defendant, by her guardian ad litem, interposed a general demurrer to the complaint.

The sole question presented to us in the case is as to the validity of the act of the territorial legislature approved December 22, 1885, making such incurable chronic mania or dementia one of the grounds upon which divorces might be granted, where the affliction had existed for ten years or more. The judge of the superior court by whom the cause was tried held that the act was contrary to public policy, and was therefore unconstitutional. No other objection was urged here, nor is there any apparent defect in the act. However it may be regarded as a measure of public policy, the power of our territorial legislature under the organic act extended to all rightful subjects of legislation. The reasons for which divorces might be granted have always been recognized as one of them, under our system of government. In fact our territorial supreme court held that the legislature could itself grant a divorce by a special act (Maynard v. Valentine, 2 Wash. T. 3, 3 Pac. 195,) and this was subsequently affirmed by the Supreme Court of the United States (Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723.) It follows that the legislature could authorize the granting of divorces by the courts, for any causes that the legislature deemed sufficient, and whether the same should be due to misfortune or misbehavior could not affect the validity of such laws. The judgment of the lower court is reversed.

2. CRUELTY.

HUMBER v. HUMBER.

(Miss.) 68 So. 161. (1915.)

Suit for divorce by James E. Humber against Lotta E. Humber. Cross-bill by defendant. Decrees denying divorce and awarding separate maintenance to wife. Plaintiff appeals. Affirmed.

REED, J.: This is a divorce suit. Both parties sought divorce, each from the other. The chancellor refused divorce to both of them.

The original bill was filed by the husband, James E. Humber. He relied upon the ground in the statute of habitual cruel and inhuman treatment. Mrs. Lotta E. Humber, the wife, filed an answer to the bill, denying the allegations thereof, and made her answer a cross-bill in which she asked for divorce on the ground of habitual cruel and inhuman treatment, and also prayed for alimony pendente lite and counsel fees, to enable her to defend the suit; also for permanent alimony, and for general relief in equity.

The chancellor on December 7, 1912, upon motion by appellee for the allowance of alimony pendente lite and counsel fees as prayed for in her cross-bill, ordered the appellant to pay her alimony at the rate of $30 per month from September 29, 1910, the date when the original bill was filed, which aggregated the sum of $789, and the further sum of $100 for account of her expenses in attendance upon court and preparation of her defense, and the further sum of $250 on account of fees to her solicitors in the cause. The chancellor further ordered appellant to pay his wife, from the time of the decree and during the pendency of this suit, the sum of $40 per month as alimony. From this decree an appeal was prosecuted.

Upon the final hearing of the cause on pleadings and proof, the chancellor in his final decree, after refusing to dissolve the bonds of matrimony, as prayed for in both the original bill and the cross-bill, retained the original bill, answer, and cross-bill for the purpose of securing to appellee proper allowance of counsel fee and sufficient allowance for her separate maintenance and support, and thereupon fixed her solicitor's fee at the sum of $1,250, which included the amount of $250 already allowed, and ordered appellant to pay to appellee,

his wife, the sum of $100 per month, beginning with July 23, 1913, for her separate maintenance and support. From this decree appellant prosecuted his appeal.

By agreement of counsel for appellant and appellee, both appeals in this case are to be heard and considered together as one. Appellant, a planter of Coahoma county, in this state, and a bachelor who had reached middle life, was on July 12, 1910, married to appellee, then Mrs. Lotta Edson, who was about 38 years of age, at her place of residence, the home of her mother in Mt. Vernon, Ind. Appellee had previously been married and was then divorced. The marriage between appellant and appellee followed a courtship, chiefly by correspondence, of some months, during which time Mr. Humber visited Mrs. Edson at her home. After the bridal tour of about two months, and as soon as the couple reached the home of Mr. Humber in this state, they separated, and shortly thereafter the divorce proceeding was instituted.

From the proof introduced by appellant, it appears his purpose to show that the cruel and inhuman treatment complained of consisted of the conduct of his wife in a number of incidents during their travels, in which she displayed temper and dissatisfaction with him and his provisions for her comfort and entertainment, and wherein she was inconsiderate of his feelings, abusive to him, discourteous and rude to his friends and kinsfolk, and generally disagreeable in her demeanor.

[The court here sets out the testimony of both parties, and continues:]

The final decree of the chancellor against the appellant in this case was on controverted facts, for we find that appellee's testimony was in clear conflict with that of appellant. We can not say that the findings of the chancellor were manifestly wrong, and we therefore can not reverse him. We find in the final decree that the chancellor held that appellant was not entitled to the relief sought, even though his testimony be taken to be true. The chancellor decided that the facts as narrated by appellant in his testimony were not sufficient to sustain the charge of habitual cruel and inhuman treatment which he relied on for divorce.

In former days the statute provided that divorce could be granted "for habitual, cruel and inhuman treatment, marked by personal violence." The words "marked by personal violence" were omitted in the Code of 1892, so that the statute now reads "habitually cruel and inhuman treatment." It is not necessary to show physical assault or actual personal violence under the present statute. It is very difficult to state

any fixed rule as to what is cruelty in cases where there is no personal violence. It appears to be the general holding of the courts that the misconduct of the spouse complained of must be such as will impair the health of the complainant or create an apprehension of bodily injury. The misconduct of the party must be such as to affect the life, or health, or general safety of the complainant.

We do not believe that there has ever been a clearer or more satisfactory discussion of the subject of divorce by reason of cruelty than that in the opinion delivered by Sir William Scott, in the celebrated case of Evans v. Evans, 2 Hagg. (English Ecclesiastical Reports) 310. Though extracts from this interesting opinion have been frequently inserted in the books, we feel that we are again justified in quoting therefrom, because we can not find elsewhere a better statement of the principles of law applicable to this case, and we therefore make the following quotation:

"What is cruelty? In the present case it is hardly necessary for me to define it, because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health and even the life of the party. I shall, therefore, decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute imposibility that the duties of the married life can be discharged. * * * What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and, if this can not be done, both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life.

They redress or punish gross violations of duty, but they go no further; they can not make men virtuous; and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. * * * Of course the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessaries, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters. The great ends of marriage may very well be carried on without them; and if people will quarrel about such matters, and which they may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum. These are the negative descriptions of cruelty; they show only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait till the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of the mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succors of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases with any effect."

Counsel for appellant contend that the conduct of appellee was such as to seriously impair the health of appellant. In

the bill of complaint it is charged that appellant apprehended that his wife would do him great bodily harm and injury, and that it was not safe for him to live with her. We can not say that the chancellor erred in holding that appellant's own testimony was insufficient to sustain his case. We can not see from appellant's testimony that he has been injured in health, or that he apprehended at the time of the separation that his wife would do him great bodily harm and injury, nor do we see that it was then unsafe for him to live with her.
* * *

[Decree affirmed.]

RADER v. RADER.

136 Iowa 223, 113 N. W. 817. (1907.)

Suit by a wife for divorce on the ground of cruelty. Decree for plaintiff. Affirmed.

DEEMER, J.: Cruel and inhuman treatment, calculated to endanger life, and consisting of the use of profane, vulgar, and obscene language toward plaintiff, threats of bodily injury, and deprivation of food and wearing apparel, were the grounds alleged for a divorce. These were denied by defendant. The trial court granted the divorce and gave plaintiff the custody of a minor child. The parties were married on the 18th day of March, 1903, and they lived together as husband and wife until March 1, 1905, when plaintiff left her husband and went to live with her parents.

The sole question in the case is one of fact, and that is: Was defendant guilty of such inhuman treatment of plaintiff as endangered her life? We shall not, of course, attempt to set out the entire record. It is enough for the purpose of the case to state our conclusions. While the case is not a strong one, we think there is enough to show that defendant used profane, obscene, insulting, and abusive language toward his wife, complained of her cooking, and generally treated her in such a manner as to endanger her life and health. He never, it is true, used physical violence, but he did that which to any ordinary woman is more cruel. After the first few weeks of married life, he seems to have lost all affection for his wife. He was profane and abusive, criticised her cooking, failed to provide her with clothing, and in other ways made life

miserable. True, most of the charge defendant denies; but the witnesses were all before the trial court, and the plaintiff's condition of health as autoptically disclosed, and her manner and demeanor upon the witness stand, as well as defendant's appearance and demeanor, should all be considered and given due weight. And in such cases as this the finding of the trial court should be given due consideration in view of the conflicting testimony adduced.

Plaintiff was comparatively a well woman when she married the defendant, and when she left him she was much broken both in health and spirits. It is not necessary, of course, to show physical assaults in order to make out a case of cruelty. The general treatment accorded the wife by the husband should be considered, and if, upon the whole record, it appears that the life and health of the wife has been endangered by ill treatment, be that nothing more than abusive, insulting, profane, and vulgar language, lack of affection, or failure to furnish the necessaries of life, a divorce should be granted.

Giving to the finding of the trial court its due weight, we are constrained to hold that the divorce was properly granted. The decree is therefore affirmed.

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3. DESERTION.

FRANKLIN v. FRANKLIN.

190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851. (1906.)

Suit by Edward Franklin against Ellen Franklin for divorce on the ground of desertion. Decree for plaintiff.

KNOWLTON, C. J.: The libelant and his wife are natives of England, where they were married in 1874, and where several children were born to them. The libelant, being a skillful mechanic, came to America "to better his condition in life" in 1891, and he has remained here ever since. His wife refused to accompany him, and he has not seen her since their separation. Some of their children have joined him here. He testified that on two occasions after his arrival in America he sent her sums of money sufficient to defray the expense of bringing her and the children who were then with her to America in a comfortable and respectable manner. Once

she kept the money, but refused to come, and on the other occasion she refused to come, and returned a portion of the money. There is an averment in the libel that the libelant has continuously resided in this commonwealth for the last five years, and we infer from the report that there is no question on this part of the case.

On these facts the libelant asked for a decree of divorce nisi for desertion; but the judge declined to order a decree, and ruled that the libelee, in thus refusing to follow her husband to this country, was not guilty of desertion, and reported the case to this court. If the ruling was wrong and the evidence warrants it, a decree nisi for a desertion is to be entered.

If the libelee was guilty of desertion, there is no question as to the jurisdiction of the court. Jurisdiction depends upon the situs of the libelant and not upon the place of the marriage, or of the commission of the offense against the marital relation. Under our statute, "if the libelant has lived in the commonwealth for five years last preceding the filing of the libel, * * * a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or elsewhere, unless it appears that the libelant has removed into this commonwealth for the purpose of obtaining a divorce." Rev. Laws, ch. 152, § 5. If, therefore, the evidence warrants a finding of utter desertion by the libelee, whether it occurred in England or in America, and if it continued for three consecutive years next prior to the filing of the libel, a divorce should be granted. Rev. Laws, ch. 152, § 1.

The fundamental fact to be considered is that the husband, as head of the family, legally responsible for its support, has a right to choose and establish a domicile for himself and his wife and children. A refusal of the wife to stay with him in that domicile, without a sufficient reason for her refusal, is desertion. This right of the husband is not limited to the state or country in which the parties live at the time of their marriage, but in these days of easy communication between different countries, and different parts of the same country, he may exercise it reasonably, in a way which will change his citizenship and allegiance. So far as he personally is concerned, if his duties to his wife are left out of consideration, this right is doubtless absolute. But in reference to the rights, duties, and liabilities of the parties in their marital relations it is not absolute. It should be exercised with some reference to the welfare of the wife. We can conceive of a choice of a domicile so plainly unreasonable and improper,

in reference to the health and welfare of the wife, that the selection of it, and an attempted enforcement of his general marital right to have her share it with him, would be extreme cruelty, such as would justify her in declining to accompany him or follow him to such a place of abode. His wife's marital right and his duty as a husband would come in conflict with the exercise of his general right to choose his own domicile, if he attempted to exercise the right in such a way as would be utterly and grossly unreasonable because of the peril to her life and health, and perhaps because of her deprivation of other things essential to her welfare. But the determination of such matters must, in the first instance and ordinarily, be left to the husband, upon whom rests the legal duty to provide for his family, as well as for himself. The wife can not legally refuse to accompany him in a change of domicile unless such a change is plainly unreasonable. See Keech v. Keech, L. R. 1, P. & D. 641; Hair v. Hair, 10 Rich. Eq. (S. C.) 163; Hardenburgh v. Hardenburgh, 14 Cal. 654.

There is nothing in the present case to show a legal excuse for the wife's refusal. There was nothing very difficult in the distance, or in the time required for the journey, or in the discomfort attending it. The removal from the old home to the new one would have involved no change of race or language in the wife's companions. It included departure from her native land and separation from the friends of her youth. But these are no more than common experiences nowadays. In these years of emigration, to hold that a wife ought not to be required to accompany her husband from England to America, if his interest and those of his family would be greatly promoted by such a change, would impede social progress and individual advancement.

We are of opinion that the ruling as matter of law that the libelee was not guilty of desertion was erroneous. In our opinion the evidence would warrant a finding that, without other excuse than her disinclination to leave her native land, she willfully refused to accompany her husband to America when his interests and those of his family required such a change of domicile, and that she persisted in this refusal. This would justify a finding of utter desertion on her part.

The alleged desertion referred to in Bishop v. Bishop, 30 Pa. 412, occurred nearly fifty years ago, when conditions were very different from those at present, and the decision was made to depend upon a question of jurisdiction under the statutes of Pennsylvania.

Decree for libelant.

DE VRY v. DE VRY.

(Okla.) 148 Pac. 840. (1915.)

Action by John V. De Vry against Lillian De Vry for divorce on the ground of abandonment. Cross-petition by defendant asking for a divorce on the same ground.

The parties were married in 1909, it being then practically agreed that they should move to Oklahoma, where the plaintiff intended to practice medicine. After the marriage they went to Oklahoma, but after a few weeks the defendant, who was dissatisfied, returned to her former home in Chicago on a visit. While there she insisted that plaintiff come to Chicago to locate. He did so, but was unsuccessful, and returned to Oklahoma. She refused to return to him, and he filed an action for divorce in May, 1911. After the suit was filed, but, it seems, before defendant learned of it, she returned to Oklahoma and offered to resume matrimonial relations with plaintiff. He told her that he had brought suit for divorce and refused to receive her. Thereupon she filed her cross-petition in the suit. Judgment for defendant for divorce and alimony. Modified by striking out the provision for alimony and affirmed.

DEVEREUX, C.: (after stating the facts). The contention of the plaintiff in error is that the husband has the right to choose the domicile of the family, and it is the duty of the wife to accompany and live with him in the home so selected, unless there be good reason for her refusing to do so, and that a failure of the wife so to do is abandonment, authorizing a divorce. There can be no question that this statement of the law is correct. Buell v. Buell, 42 Wash. 277, 84 Pac. 821; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851; 14 Cyc. 612.

But the facts in the case at bar are not sufficient to apply this rule. It appears that, before the wife had notice of the divorce proceedings, she yielded to the will of her husband and consented to live with him, coming to Oklahoma for that purpose; and the trial court having found the issues in favor of the defendant, and there being evidence to support this finding, it can not be disturbed by this court. In Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322, it is held, in an action for divorce on the ground of abandonment, that:

"Where the party, who was originally the deserter, offers to return, the fault of desertion will be thrown upon the other spouse, if the offer is refused provided the offer to return

be made in good faith and not simply to create a ground for divorce. Whether an offer by a spouse to return, after having deserted the other, was made in good faith, is a question of fact, and the determination of the [trial] court will not be disturbed when there is any ground to support it."

This case is directly in point with the case at bar. The wife undoubtedly was originally in fault in not following the husband to the marriage domicile established by him. The record entirely fails to show any good reason why she should not live in Oklahoma; but on her offer to return, which the court by its finding in her favor has found was in good faith, the husband became a wrongdoer himself by refusing to allow her to do so.

On the question of alimony, the court below allowed $500 as permanent alimony and an attorney fee of $146. Under the evidence in this case, we think this allowance of alimony was excessive. The parties had been married but a short time and there is no evidence that any property was accumulated by the husband through the assistance of the wife, or that she had any property when she married which had gone to him. His income was in cash between $50 and $60 a month, with doubtful accounts of about as much more. In allowing a gross sum of $500 in this condition of the husband's finances, we think the court erred. After this appeal was taken to this court, an order was made on October 1, 1912, requiring the plaintiff to pay into court the sum of $20 a month temporary alimony and $100 attorney fee. Under this order, he has paid into court the sum of $835. Under all of the circumstances of this case, considering the amount which the defendant has received under the order since October 1, 1912, and the undisputed financial condition of the plaintiff, we think the judgment for alimony should be set aside.

We therefore recommend that the judgment be modified by striking the judgment for alimony therefrom, and, as thus modified, the judgment below be affirmed.

PER CURIAM. Adopted in whole.

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4. RECRIMINATION.

PEASE v. PEASE.

72 Wis. 136, 39 N. W. 133. (1888.)

Action by a husband for a divorce on the ground of adultery. Defendant in her answer denied the adultery and asked for

limited divorce on the ground of cruel and inhuman treatment. Both parties found guilty and divorce denied to both. Affirmed.

COLE, C. J.: The plaintiff and appellant brought this action for a divorce from the bonds of matrimony on the ground of adultery committed by the defendant. The wife denied the charge of adultery in her answer, and by way of recrimination, defense, or bar to the plaintiff's action, asked for a limited divorce from the husband on the ground of cruel and inhuman treatment on his part. On the trial of the issue of adultery the jury found against the defendant, and the court found the plaintiff guilty of cruel and inhuman treatment of the defendant, and held that neither party was entitled to a decree of divorce. The sole question before us on this appeal is the correctness of this decision.

Our statute makes adultery and cruel and inhuman treatment of the wife by the husband equally grounds of divorce. Section 2356. The statute places them upon the same ground, attended by the same legal consequences. The cruelty complained of and proved were acts of personal violence on the part of the husband; his striking her in one instance a severe blow in the face with his fist while she was lying in bed, which blow caused a wound that bled freely, and left a bruise for several days upon the face. The circuit court also found other instances proved of violent conduct on the plaintiff's part towards his wife, which in some cases were mitigated to some extent by her improper and exasperating behavior. The evidence is not before us, but we must presume it fully sustained the finding of the court on the facts. So, the simple question presented is, where it is shown that each party has been guilty of an offense which the statute has made a ground for divorce in favor of the other, will the court interfere and grant relief to either offending party? We do not perceive upon what logical principle the court could grant redress to the husband for the adultery of the wife when he himself has been guilty of an offense which would give her a right to an absolute divorce were she without fault. Both parties have violated the marriage contract, and can the court look with more favor upon the breach of one than the other? It is an unquestioned principle that where one party is shown to have been guilty of adultery such party can not have a divorce for the adultery committed by the other. Smith v. Smith, 19 Wis. *522. Mr. Bishop says there is an entire concurrence of judicial opinion upon that point both in England and in this country, and that it makes no difference which was the earlier offense; nor even

that the plaintiff's act followed a separation which took place on the discovery of the adultery of the defendant. 2 Bish. Mar. & Div. § 80. In the forum of conscience, adultery of the wife may be regarded as a more heinous violation of social duty than cruelty by the husband. But the statute treats them as of the same nature and same grade of delinquency. It is true, the cruelty of the husband does not justify the adultery of the wife; neither would his own adultery,—but still the latter has ever been held a bar. And where both adultery and cruelty are made equal offences, attended with the same legal consequences, how can the court, in the mutual controversy, discriminate between the two, and give one the preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike and hold one a bar to the other. The following authorities enforce this view of the law where the divorce law is like our own: Hall v. Hall, 4 Allen 39; Handy v. Handy, 124 Mass. 394; Nagel v. Nagel, 12 Mo. 53; Shackett v. Shackett, 49 Vt. 195; Conant v. Conant, 10 Cal. 249; 2 Bish. Mar. & Div. §§ 78-87. See also, Adams v. Adams, 17 N. J. Eq. 325; Yeatman v. Yeatman, L. R. 1 Prob. & Div. 489; Lempriere v. Lempriere, Id. 569. We therefore think the circuit court was right in holding upon the facts that neither party was entitled to a divorce, because each was guilty of an offense to which the law attached the same legal consequences. But the plaintiff's counsel contends that under section 2360, which provides that in an action for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce (1) when the offense shall appear to have been committed by the procurement or with the connivance of the plaintiff; (2) where the adultery charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof or by the voluntary cohabitation of the parties with knowledge of the offense; (3) when there shall have been no express forgiveness and voluntary cohabitation of the parties, but the action shall not have been brought within three years after the discovery by the plaintiff of the offense charged. As the adultery, he says, was found in the case, but none of the facts set forth in the above three subdivisions were found to exist, therefore the divorce should have been granted. This provision is declaratory of the common law, and gives the trial court discretion to refuse a divorce for adultery where certain things were proved or shown to exist. It might be claimed, in view

of the statutory provisions, that the court had no discretion in the matter where the adultery was established, but was absolutely bound to grant the divorce, though there had been connivance of the parties, or condonation, or the injured party had unduly delayed bringing the action after a discovery of the offense. To remove all doubt upon that point the provision was enacted. It was not intended to do away with the general principle that one cannot have redress for a breach of the marriage contract which he has violated by committing a like offense as that of which he complains, but must come into court with clean hands. This principle still pervades our law, and must be recognized. From these views it follows that the judgment of the circuit court must be affirmed.

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5. CONFLICT OF LAWS—FOREIGN DIVORCES.

LOKER v. GERALD.

157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. 252. (1892.)

Writ of dower by Maggie L. Loker claiming as the widow of William Loker. Defendant Gerald, tenant in possession, claimed that plaintiff was barred by a divorce obtained by Loker from her in Colorado and introduced a copy of the record of the divorce. Plaintiff denied the validity of the divorce. The court directed a verdict for the defendant. Judgment on the verdict.

FIELD, C. J.: We think that it appears that the divorce was obtained in the state of Colorado in accordance with the statutes of that state, and that the service of process on the wife, who is the demandant in the present action, was also in accordance with these statutes. The report recites that "it was not claimed by the demandant that the said William Loker went to Colorado for the purpose of procuring a divorce," and it must be taken that he was a bona fide resident of that state for more than a year before his suit for divorce was brought, which is the time required by the statutes of Colorado, when the cause of divorce occurred in another state.

A copy of the bill of complaint for divorce and of the sum-

mons was served on the wife in Massachusetts, where she lived; and the causes of divorce set forth by the bill were desertion for more than a year, and adultery; and the court, after hearing evidence, decreed a divorce from the bonds of matrimony for desertion. Great pains were taken to give the wife notice and an opportunity to be heard.

The parties were married in Massachusetts, and lived there as husband and wife, but the husband removed to Colorado, and we infer that the wife did not, but remained in Massachusetts, and we infer that the desertion on account of which the divorce was granted began in Massachusetts. The real contention is that as the wife was never domiciled in Colorado, and was never served with process in that state, the court had no jurisdiction over her to dissolve the marriage.

It must be noticed that, by our statutes, desertion, continued for three years, and adultery, are causes of divorce; and that the statutes authorize divorces for causes occurring in other states, even when the parties were not married in this commonwealth and were not inhabitants of the commonwealth at the time of the marriage, provided the libelant has resided in the commonwealth for five years next preceding the filing of the libel, and did not remove into the commonwealth for the purpose of obtaining a divorce. Pub. St. ch. 146, § 5. In practice here, divorces are often granted in cases in which the libelee has never resided within the commonwealth, upon service made by publication, and by a registered letter sent to the libelee, or notice served upon him or her, in another state, as the court may direct. Pub. St. ch. 146, §§ 9, 10. Pub. St. ch. 146, § 41, provides that "a divorce decreed in another state or country, according to the laws thereof, and by a court having jurisdiction of the cause, and of both the parties, shall be valid and effectual in this commonwealth," except in certain cases not material to the present inquiry.

The various decisions of the courts of different states and countries on the question of the jurisdiction of a court to dissolve the bonds of matrimony, when only the libelant is domiciled within the state or county to which the court belongs, and the effect to be given to a decree of divorce in other states or counties, if the court takes jurisdiction, and enters a decree, are well known, and they are fully considered in 2 Bish. Mar. & Div. chaps. 2-6.

It is sufficient for the present case to say that by our decisions, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that, therefore, for the purpose of divorce, the court in Colo-

rado had jurisdiction of both the parties, within the meaning of the statute. The fact that our courts grant divorces under somewhat similar circumstances is a reason why, as a matter of comity, we should recognize the validity of this divorce. Burlen v. Shannon, 115 Mass. 438. We are not now required to consider whether the rule of law would not be the same, independently of the legal fiction that the domicile of the wife follows that of the husband. The decision in Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435, was upon the effect of a decree annulling the marriage ab initio, and the court expressed no opinion upon the effect of a decree of divorce made under the circumstances there stated.

Judgment on the verdict.

BELL v. BELL.

181 U. S. 175, 45 L. Ed. 804, 21 Sup. Ct. 551. (1901.)

Suit in the Supreme Court of New York by Mary G. Bell against Frederick A. Bell for divorce. Defendant pleaded a divorce granted to him in Pennsylvania. Judgment for plaintiff. Affirmed by Court of Appeals (157 N. Y. 719). Writ of error from the Supreme Court of the United States. Affirmed.

Statement by Mr. Justice Gray:

This was an action brought December 22, 1894, in the supreme court for the county of Erie and state of New York, by Mary G. Bell against Frederick A. Bell, for a divorce from the bond of matrimony, for his adultery at Buffalo, in the county of Erie, in April and May, 1890, and for alimony.

The defendant appeared in the case, and pleaded a decree of divorce from the bond of matrimony, obtained by him January 8, 1895, in the court of common pleas for Jefferson county, in the state of Pennsylvania, for her desertion.

The plaintiff replied, denying that the court in Pennsylvania had any jurisdiction to grant the decree, and alleging that no process in the suit there was ever served on her, and that neither she nor her husband ever was or became a resident or citizen of the state of Pennsylvania.

The present action was referred to a referee, who found the following facts: The parties were married at Bloomington, in the state of Illinois, on January 24, 1878, and there-

after lived together as husband and wife at Rochester, and afterwards at Buffalo, in the state of New York. In August, 1882, the plaintiff went to Bloomington on a visit to her mother. In her absence, the defendant packed up her wearing apparel and other property in trunks, and had them put in the stable, preparatory to sending them to her at Bloomington. In September, 1882, the plaintiff, accompanied by her mother, returned to the defendant's house, stayed there three or four days, and then left, with her mother, for Bloomington; and since then the plaintiff and defendant have not lived together, and she has always claimed her residence as being at Buffalo.

On January 8, 1895, the court of common pleas of Jefferson county, in the state of Pennsylvania, granted to the husband, on his petition filed April 9, 1894, alleging that he was and had been for a year a citizen of that state and a resident of that county, a decree of divorce from the bond of matrimony for her desertion, which, under the laws of Pennsylvania, was a ground for dissolving marriage. The subpoena in that action was not served upon the wife, but she was served by publication according to the laws of Pennsylvania, and he received through the mail a copy of the subpoena and of a notice of the examiner that he would attend to the duties of his appointment on December 14, 1894, at his office in Brookville in Jefferson County. She did not appear in person or by attorney, and judgment was rendered against her by default.

At the time of the beginning of that action and of the rendering of that decree the wife was a resident of the state of New York, and the husband was not a bona fide resident of the state of Pennsylania. On January 31, 1894, the husband and his sister presented a petition, upon oath, to the surrogate of Erie county, for the probate of the will of their mother, in which he was described as residing at Buffalo, in the county of Erie and state of New York. No evidence was offered to show that he actually changed his domicile from New York to Pennsylvania.

The referee also found the husband's adultery as alleged, and reported that the wife should have judgment for a divorce from the bond of matrimony, and for alimony in the sum of $3,000 during her life, from the commencement of this action, payable quarterly, and for costs. The court confirmed his report, and rendered judgment accordingly for a divorce, alimony, and costs. That judgment was affirmed by the general term and by the court of appeals. 4 App. Div. (N. Y.) 527, 40 N. Y. S. 443, 157 N. Y. 719, 53 N. E. 1123.

The defendant sued out this writ of error upon the ground that the judgment below did not give full faith and credit to the judgment in Pennsylvania, as required by the Constitution and laws of the United States.

After the argument of the case in this court, the defendant died; and the plaintiff moved that judgment be entered nunc pro tunc.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

The question in this case is of the validity of the divorce obtained by the husband in Pennsylvania. No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a bona fide residence within the state for one year next before the filing of the petition. Penn. Stats. March 13, 1815, ch. 109, § 11; May 8, 1854, ch. 629, § 2; Hollister v. Hollister, 6 Pa. 449. The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897. The referee in this case has not only found generally that at the time of those proceedings the wife was a resident of the state of New York, and the husband was not a bona fide resident of Pennsylvania, but has also found that on January 31, 1894, some ten weeks before he filed his petition in Pennsylvania, he described himself, under oath, in a petition for the probate of a will in Erie County, in the state of New York, as a resident of that county, and that no evidence was offered that he actually changed his domicile from New York to Pennsylvania. Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other state. Leith v. Leith (1859), 39 N. H. 20; People v. Dawell (1872), 25 Mich. 247; Sewall v. Sewall (1877), 122 Mass. 156, 23 Am. Rep. 299; Litowitch v. Litowitch (1878), 19 Kans. 451, 27 Am. Rep. 145; Van Fossen v. State (1881), 37 Ohio St. 317, 41 Am. Rep. 507; Gregory v. Gregory (1886), 78 Maine 187, 57 Am. Rep. 792; Dunham v. Dunham (1896), 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Thelen v. Thelen (1899) 75 Minn. 433, 78 N. W. 108; Magowan v. Magowan (1899), 57 N. J. Eq. 322, 42 Atl. 330.

The death of the husband, since this case was argued, of itself terminates the marriage relation, and, if nothing more had been involved in the judgment below, would have abated the

writ of error, because the whole subject of litigation would be at an end, and no power can dissolve a marriage which has already been dissolved by act of God. Stanhope v. Stanhope (1886), L. R. 11 Prob. Div. 103, 111. But the judgment below, rendered after appearance and answer of the husband, is not only for a divorce, but for a large sum of alimony, and for costs. The wife's rights to such alimony and costs, though depending on the same grounds as the divorce, are not impaired by the husband's death, should not be affected by the delay in entering judgment here while this court has held the case under advisement, and may be preserved by entering judgment nunc pro tunc as of the day when it was argued. Downer v. Howard (1878), 44 Wis. 82; Francis v. Francis (1879), 31 Gratt. 283; Danforth v. Danforth (1884), 111 Ill. 236; Mitchell v. Overman (1880), 103 U. S. 62, 26 L. ed. 369.

Judgment affirmed, nunc pro tunc, as of April 26, 1900.

THOMPSON v. THOMPSON.

226 U. S. 51, 33 Sup. Ct. 129. (1913.)

Suit by Jessie E. Thompson against Charles N. Thompson for maintenance brought in the Supreme Court of the District of Columbia. The defendant set up a decree of divorce rendered in his favor against the plaintiff in a Virginia court. There was a decree for the plaintiff which was reversed by the Court of Appeals of the District, from which latter decree an appeal was taken to the United States Supreme Court. Affirmed.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a decree of the Court of Appeals of the District of Columbia, reversing a decree of the Supreme Court of the District in favor of the wife in a suit for maintenance, brought under § 980 of the District Code (act of March 3, 1901, 31 Stat. at L. 1346, ch. 854). The bill of complaint was filed July 29, 1907, and charged the husband with failing and refusing to maintain the complainant, and with cruel treatment of such character as to compel her to leave him. Upon the filing of the bill a subpœna to answer was issued and returned "not found," whereupon alias and pluries writs were successively issued and returned until November 18, 1907, when the husband was served with process. Meanwhile, and on Septem-

ber 3, 1907, he brought suit against the wife in the circuit court of Loudoun County, Virginia, for divorce a mensa et thoro, upon the ground that on June 13, 1907, the wife wilfully abandoned his bed and board and deserted him without cause, and that notwithstanding his repeated entreaties and endeavors to induce her to return, she had refused to do so. An order of publication having been made and published, the Virginia court, on October 19, 1907, made a decree granting to the husband a divorce a mensa et thoro. He thereafter, on being served as already mentioned with process in the wife's suit, filed a plea setting up the Virginia decree and the proceedings upon which it was rendered, as a bar to her action. This plea was, on hearing, overruled, the husband being allowed time in which to answer the bill. He answered, denying the wife's charges of cruelty, and setting up other matters pertaining to the merits, and also averred that his domicil, as well as the matrimonial domicil of the parties, was in Loudoun County, Virginia, and again pleaded the Virginia proceedings and decree as a bar to the wife's suit. The Supreme Court of the District, upon final hearing, held the Virginia divorce to be invalid, and made a decree awarding to the wife custody of an infant child born to the parties during the pendency of the proceedings, and requiring the husband to pay to the wife $75 per month for the maintenance of herself and the child, to forthwith pay to her the sum of $500 for counsel fees, and also to pay the costs of suit to be taxed. From this decree the husband appealed to the court of appeals of the District, which court reversed the decree and remanded the cause, with directions to enter an order vacating the decree and dismissing the bill. 35 App. D. C. 14.

[Here the court considered the question of its jurisdiction of the appeal, and after holding that it had jurisdiction, continued:]

The next question is whether the court of appeals was right in holding that the Supreme Court of the District erred in refusing to give credit to the Virginia decree.

Article 4, § 1, of the Constitution, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." By § 905, Rev. Stat. (U. S. Comp. Stat. 1901, p. 677), the mode in which such acts, records, and proceedings are to be proved was prescribed; and it was enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within

the United States as they have by law or usage in the courts of the state from which they are taken." This latter clause finds its origin in the first act passed by Congress to carry into effect the constitutional mandate (act of May 26, 1790, ch. 11, 1 Stat. at L. 122, U. S. Comp. Stat. 1901, p. 677); and, in an early case, it was held that the words "every court within the United States" include the courts of the District of Columbia, and require those courts to give full faith and credit to the judicial proceedings of the several states when properly authenticated. Mills v. Duryee, 7 Cranch (U. S.) 484, 485, 3 L. ed. 413.

But it is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the res in proceedings in rem. D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. ed. 648; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. ed. 897; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Bigelow v. Old Dominion Copper Min. & S. Co., 225 U. S. 111, 134, 56 L. ed. 1009, 1024, 32 Sup. Ct. 641.

This subject, in its relation to actions for divorce, has been most exhaustively considered by this court in two recent cases: Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. 544; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525, 5 Ann. Cas. 1. In the Atherton case the matrimonial domicil was in Kentucky, which was also the domicil of the husband. The wife left him there and returned to the home of her mother in the state of New York. He began suit in Kentucky for a divorce a vinculo matrimonii because of her abandonment, which was a cause of divorce by the laws of Kentucky, and took such proceedings to give her notice as the laws of that state required, which included mailing of notice to the postoffice nearest her residence in New York. No response or appearance having been made by her, the Kentucky court proceeded to take evidence and grant to the husband an absolute decree of divorce. It was held that this decree was entitled to full faith and credit in the courts of New York. In the Haddock Case, the husband and wife were domiciled in New York, and the husband left her there, and, after some years, acquired a domicil in Connecticut, and obtained in that state, and in accordance with its laws, a judgment of divorce, based upon constructive, and not actual, service of process on the wife, she having meanwhile retained her domicil in New York, and having made no appearance in the action. The wife afterwards sued for divorce in New York, and obtained personal service in that state upon the husband. The New York

court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at any time a matrimonial domicil in the state of Connecticut, and therefore the res—the marriage status—was not within the sweep of the judicial power of that state.

In the present case it appears that the parties were married in the state of Virginia, and had a matrimonial domicil there, and not in the District of Columbia or elsewhere. The husband had his actual domicil in that state at all times until and after the conclusion of the litigation. It is clear, therefore, under the decision in the Atherton case and the principles upon which it rests, that the State of Virginia had jurisdiction over the marriage relation, and the proper courts of that state could procede to adjudicate respecting it upon grounds recognized by the laws of that state, although the wife had left the jurisdiction and could not be reached by formal process.

But in order to make a divorce valid, even when granted by the courts of the state of the matrimonial domicil, there must be notice to the defendant, either by service of process, or (if the defendant be a nonresident) by such publication or other constructive notice as is required by the law of the state. Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. 328; Atherton v. Atherton, 181 U. S. 155, 171, 172, 45 L. ed. 794, 803, 21 Sup. Ct. 544. In Cheely v. Clayton, because the notice was published against the defendant without making such effort as the local law required to serve process upon her within the state, this court held, following repeated decisions of the state court, that the decree of divorce was wholly void for want of jurisdiction in the court that granted it; and that the liberty conferred by the local statute upon a defendant on whom constructive service only had been made, to apply within three years to set the decree aside, did not make it valid when the constructive service was so defective.

The Virginia decree now in question is attacked for want of jurisdiction on the ground that the affidavit used as a basis for the order of publication was made upon information and belief, and not upon personal knowledge. It is insisted that the order was therefore unauthorized and all proceedings based upon it null and void.

[Here the court considered the question of the sufficiency of the affidavit under the Virginia practice, and concluded as follows:] The material fact upon which, according to the laws of that state, the jurisdiction of the Virginia court depended, was the nonresidence of the defendant. The Code required

(§ 3230) that this fact should appear by affidavit. The affidavit in question set forth the fact; the circumstance that it was averred on information and belief affected merely the degree of proof. In the absence of any local law excluding the use of such an affidavit, the decision of the state court accepting it as legal evidence must be deemed sufficient, on collateral attack, to confer jurisdiction in that court over the subject-matter, in accordance with local laws.

This being so, it is clear that the resulting decree is entitled, under the act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of that state provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the circuit courts (Va. Code, §§ 2257-2260, 2264, 2266; Bailey v. Bailey, 21 Gratt. (Va.) 43; Carr v. Carr, 2 Gratt. (Va.) 168; Latham v. Latham, 30 Gratt. (Va.) 307); and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right, she may by her conduct forfeit it, and where she is the offender, she can not have alimony on a divorce decreed in favor of the husband (Harris v. Harris, 31 Gratt. (Va.) 13), it is plain that such a decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia.

From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this District.

Decree affirmed.

II. PARENT AND CHILD.

1. Support of Child.

VAN VALKINBURGH v. WATSON.

13 Johns. (N. Y.) 480, 7 Am. Dec. 395. (1816.)

Action by Watson against Van Valkinburgh to recover for necessaries furnished latter's son. On the trial it appeared that the son came to Watson's store and purchased a coat for himself, but there was no evidence that it was done with his

father's consent. Defendant proved that his son lived in his family, and was comfortably and decently clothed according to his circumstances. Verdict and judgment for plaintiff. Reversed.

PER CURIAM: A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril. (Simpson v. Robertson, 1 Esp. 17; Ford v. Fothergill, Id. 211.) In the case of Bainbridge v. Pickering, 2 W. Bl. 1325, Gould, J., says, with great propriety: "No man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father or mother." Where the infant is sub potestate parentis there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent. In this case there is no ground to charge the father with any neglect of duty, in providing necessaries for his child, and the judgment must be reversed.

PORTER v. POWELL.

79 Iowa 151, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. 353. (1890.)

Action by a physician to recover for professional services to defendant's daughter. The facts appear from the question certified by the trial court to the Supreme Court as follows: "Is a father legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who, at the date of said treatment, was seventeen years of age, and was then, and had been, residing away from her father's house for three years prior to the rendering of said services, earnings and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing, or agreeing with his daughter to furnish, her with any money, or means of support, but consenting to her absence from home; the said professional services being

rendered at the request of the said minor daughter, but were rendered and furnished without the procurement, knowledge, or consent of the defendant, and without knowledge of the sickness, until demand was made for payment of said services by plaintiff, the attendance of plaintiff being from day to day, for a period of twenty days?"

Judgment for plaintiff and defendant appeals. Affirmed.

GIVEN, J.: 1 Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforcible in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law.

At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See Kelley v. Davis, 49 N. H. 187; Farmington v. Jones, 36 N. H. 271; Gordon v. Potter, 17 Vt. 348. A different doctrine has long since been held in this state. In Dawson v. Dawson, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In Johnson v. Barnes, 69 Iowa, 641, 29 N. W. 759, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the court say: "As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common law is somewhat uncertain, ill defined, and doubtful. Indeed, it has been said that there is no such obligation. * * * But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person, who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed."

In Van Valkenburgh v. Watson, 13 Johns. 480, it is said: "A parent is under a natural obligation to furnish necessaries for his infant children; and, if the parent neglect that duty, any

other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." In 5 Wait, Act. & Def. 50, the author says: "The duty of parents to support, protect and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. * * * In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. * * * The legal obligation of parents in respect to support, extends only to those things which are necessary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them."

Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent can not be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

2. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn. Parents are entitled to the care, custody, control and services of their children during minority. To emancipate is to release; to set free. It need not be evidenced by any formal or required act. It may be proved by direct proof or by circumstances. To free a child, for all the period of minority, from care, custody, control and service would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody and control, so far as the same can be exercised consistently with the right waived. He frees his son of 18 from service for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period the parent may assert his right to

the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. In the law of contracts, where a father expressly or impliedly, by his conduct, waives his right generally to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts, as are made with him for his services. Nightingale v. Withington, 15 Mass. 272; McCoy v. Huffman, 8 Cow. 84; Stiles v. Granville, 6 Cush. 458; Schouler, Dom. Rel. § 267. There is nothing in these authorities, nor any reason, against the view expressed, that emancipation may be general or limited. There is no direct evidence as to the purpose of the defendant with respect to his daughter; but we are to say, from the circumstances shown, whether they evidence either a general or limited emancipation.

The case of Everett v. Sherfey, 1 Iowa, 358, is relied upon. That was an action to recover damages of the defendant for having harbored and retained the plaintiff's minor son in his employ. The issues and circumstances were quite different from those certified in this case. The court say: "There could be no such harboring as would render the defendant liable to the father in this action, if the son was in truth emancipated, and, if the son was not emancipated, it will still be a question whether there was such harboring as renders the defendant liable. By 'emancipation,' in this connection, we understand such act of the father as sets the son free from his subjection, and gives him the capacity of managing his own affairs as if he was of age." The following is given as a condensed statement of the facts: "In the spring or summer of 1852, plaintiff's son, a minor of the age of seventeen, went to reside at defendant's house, and was then and afterwards employed by him as a hired hand for over one year; the defendant paying the son full wages for his services. In February, 1853, plaintiff sued defendant to recover for the services, in which suit the judgment was for the defendant. The son was of a dissatisfied and roving disposition, careless and improvident in his habits, not under parental control, and, either through wilfulness or negligence, had not received the education proper for a person of his age and condition. In December, 1851, a misunderstanding arose between the parent and the child, which resulted in the son's leaving home, and residing and working at various places, before he went into the defendant's service. After said December, 1851, the father did not, apparently, have or exercise the proper and necessary control and authority over the said minor that a parent of a

well-regulated family ought and should exercise, and permitted and sanctioned the hiring out of said minor at various places, and at different employments, away from home; but who made the contracts, or received the pay, is not stated nor proved. The father had also stated that he had no control over his son, and had in some instances waived his authority over him. It also appears that on the 11th of September, 1852, the plaintiff, by publication in a newspaper, forewarned all persons from crediting his said son on his account, avowing, also, therein that he would pay no debts of his contracting, and that he would not fulfill any contracts, or pay debts, entered into by him." The court say: "From these circumstances, to mention none others, we think the court might fairly conclude there was a manumission or emancipation up to the time above stated, and that there was no liability for giving the son shelter, residence, and a home. At least, we think it so fairly deducible from the facts that we should not disturb the conclusion."

The circumstances disclosed in this case are these: The defendant's daughter, at the age of 14, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned and controlled her own wages, and provided herself with clothing, her father consenting thereto; he not furnishing, or agreeing to furnish, her with any money, or means of support. That, while thus absent, she was dangerously attacked with typhoid fever, and at her request was attended by the plaintiff, as her physician, from day to day, for a period of twenty-one days, which services were rendered without the procurement, knowledge, or consent of the defendant. These circumstances are widely different from those in Everett v. Sherfey. Here there was no disagreement that resulted in the daughter leaving home; no want or waiver of parental authority; no dissatisfied and roving disposition; no statement by the father that he had no control over his daughter; and no publication by the father notifying persons not to credit her on his account.

The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents, either from necessity or from a desire to teach their children to be industrious and self-supporting, emancipate them from service, for a definite or indefinite time, without any intention of thereby releasing their right to exercise care, custody and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness, or accident—who, most of all others, need

support—would not be entitled to it. Blackstone, in his Commentaries (volume 1, p. 446), says: "The duty of parents to provide for the maintenance of their children is a principle of natural law,—an obligation, says Puffendorf, laid on them, not only by nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents." This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessaries. What are necessaries must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right to care, custody, control and services, with the duty to support.

3. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident, but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control and support. There was no such an emancipation as exempted the father from liability for actual necessaries furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third per-

son for actual necessaries furnished to her. As already stated, what are necessaries must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence. Our conclusion is that the judgment of the district court should be affirmed.

Beck, J., delivered a dissenting opinion.

2. EMANCIPATION.

State v. Lowell, 78 Minn. 166, 80 N. W. 877, ante, p. 9.

Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, ante, p. 80.

Porter v. Powell, 79 Iowa 151, 44 N. W. 295, ante, p. 189.